Treasury's Letter to Arizona May Impact Muni Issuance Disclosures.

The Department of the Treasury's Friday letter detailing its intentions to clawback some of Arizona's COVID-19 relief aid if the state doesn't redesign two of its pandemic-related programs may impact the disclosure of any state facing the prospect of a fight over those funds.

The American Rescue Plan Act's final rule on how its State and Local Fiscal Recovery Fund Program may be used included a provision which would deem programs, including using the stimulus funds to offset tax cuts, as "ineligible uses". The letter to Arizona Gov. Doug Ducey indicated that two programs, one being the $163 million grant program for schools that follow state laws banning public school mask mandates, would fall in that category.

"This is a unique situation since the letter was addressed to the state," said Eryn Hurley, deputy director of government affairs at the National Association of Counties. "Under ARPA, the state was allocated a portion of the funds and the counties were given their own allocations."

The American Rescue Plan Act allocated $65.1 billion to counties, which is separate from the state allocation and dispersed directly from the Treasury to the counties. Since the letter is addressing actions at the state level, its impact will largely stay at the state level and won't bleed into counties, Hurley said.

According to Dave Erdman, capital finance director for the State of Wisconsin, the Treasury's move to reign in Arizona shows they're willing to enforce the exact language on ARPA and SLFRF.

"From a municipal bond issuance perspective, it's clear that the Treasury will threaten and use these programs that came out of the ARPA," Erdman said. "But the biggest question is in regards to disclosure."

"How does a clawback of such need to be disclosed?" he added. "If the State of Arizona was going to do a public offering, or any state threatened with clawback, how do you get this information to investors, because it could be material."

A clawback at the state level could then affect future bond offerings, Erdman said, if a state was preparing an offering then gets hit with a clawback from Treasury.

"Treasury has to be careful when making those kinds of statements because it could scare investors and have an impact on the pricing of a transaction," Erdman said.

The Treasury letter gives the State of Arizona 60 days to remedy its two related programs, which from Ducey's Twitter response, doesn't seem likely.

"When it comes to education, President Biden wants to continue focusing on masks," he wrote. "In Arizona, we're going to focus on math and getting kids caught up after a year of learning loss."

“We will respond to this letter and we will continue to focus on things that matter to Arizonans,” he added.

By Connor Hussey

BY SOURCEMEDIA | MUNICIPAL | 01/18/22 02:47 PM EST

Hawkins Advisory: Final Treasury Reissuance Regulations Addressing Modifications of Debt Instruments to Replace IBORs

Attached is a Hawkins Advisory describing recently released final Treasury Regulations providing guidance in connection with the reissuance consequences arising from modifications of existing debt instruments and other contracts to replace discontinued Interbank Offered Rates with alternative reference rates.

View the Hawkins Advisory.

An ESG Reckoning Could Be on the Horizon for Municipal Bonds.

The Municipal Securities Rulemaking Board, the self-regulatory organization over municipal bond issuers, has started a key first step on the way to regulation within the space. The MSRB has issued a Request for Information as of December, seeking to find out what ESG borrowers are disclosing regarding how their bonds relate to ESG, reports Bloomberg.

Municipal bonds related to ESG experienced a record year last year, bringing in $24.6 billion of green debt, the biggest portion of the ESG muni pie. However, an analysis done last year by a UN group found that borrowers weren’t disclosing ESG data effectively or with any type of consistency, including risks that pertained to the environment and climate change.

Current ESG standards within municipal bonds are such that data and what is reported, as well as the frequency it is reported at, are all optional. The call for commentary, which is an appeal to public officials, bankers, investors, as well as the general public, focuses heavily on phrasing centered around the word “standard” or an iteration of it.

It’s a bit of a writing on the wall situation and mirrors a larger call that the SEC put out in March 2021 requesting ESG commentary on climate disclosures by issuers. While no regulations have been forthcoming yet, analysts anticipate some sort of guidance at minimum to be released by the Commission this year.

The main culprit in drawing the regulatory attention within munis could be the very thing that brought in so much money to the space: green bonds. At their inception in 2013 when Massachusetts sold the very first self-styled green bonds to pay for a host of upgrades centered around energy efficiency, water quality, and pollution control, any state or local government could create a bond and decide that it was green without any oversight or standards. That’s still mostly the case, though there have been some attempts at creating standards within the industry since.

“Many investors and other market participants are seeking ESG-related information beyond what

historically has been provided to the market. In response, private vendors are offering ESG certification service," writes the MSRB in their statement.

The cropping up of private vendors centered around green bonds creates the potential for an uneven playing field for investors, with some investors having access to potentially better information, or even more information, than what is currently legally required. It's something the MSRB could be seeking to remedy in their Request for Information, and it remains to be seen what will come of the information gathered once the window closes for submissions.

ETF TRENDS

by KARRIE GORDON

JANUARY 5, 2022

GASB Adds Major Project, Pre-Agenda Research Area to Technical Plan.

Norwalk, CT, January 6, 2022 — During its December 2021 meeting, the Governmental Accounting Standards Board (GASB) approved the addition of a major project on going concern uncertainties and severe financial stress and pre-agenda research activity on subsequent events as part of its technical plan for the first third of 2022.

Going Concern Uncertainties and Severe Financial Stress

The GASB added this project based on the results of more than five years of research on the GASB's existing standards for going concern uncertainties and current practice with respect to identifying governments experiencing or in danger of severe financial stress.

The concept of going concern uncertainties was not specifically developed or significantly modified for the government environment when incorporated into the current GASB literature. Pre-agenda research indicates that, even when governments are in or have been experiencing severe financial stress, few dissolve or cease operations. Although current guidance provides that financial statement preparers have a responsibility to evaluate a government's ability to continue as a going concern, such an evaluation often poses challenges and has resulted in diversity in practice. These challenges also include determining whether or when governments have a responsibility to evaluate and disclose their exposure to severe financial stress.

The objectives of the project are to consider (1) improvements to existing guidance for going concern considerations (including the definition of a going concern) to address diversity in practice and clarify the circumstances under which disclosure is appropriate, (2) developing a definition of severe financial stress and criteria for identifying when governments should disclose their exposure, and (3) what information about a government's exposure to severe financial stress is necessary to disclose.

Subsequent Events

The objective of the pre-agenda research item on Subsequent Events is to (1) evaluate the effectiveness of the existing guidance for identifying and reporting subsequent events and (2) consider the need for revisions to those standards. If additional guidance is determined to be needed, another objective would be to consider the development of revised accounting and financial

reporting for subsequent events.

As part of its consideration of the first-third 2022 technical plan, the GASB also considered but chose not to add (1) a project on interim financial reporting and (2) a pre-agenda research activity on related-party transactions.

More information on the new project and pre-agenda research activity is available on the GASB website under the Technical Plan section.

Muni Market's Regulator Is Seeking Standards for Disclosure on ESG Debt.

- **MSRB asks for feedback on how issuers disclose credit risk**
- **Government finance officers released best practices in 2021**

There's a big mess in MuniLand, and the Municipal Securities Rulemaking Board wants to clean it up.

The mess is "Environmental, Social and Governance" practices by municipal issuers, and the MSRB, the self-regulatory organization in charge of the $4 trillion market, wants feedback — from bankers to public officials to investors and the general public — about what borrowers disclose on how ESG relates to their bonds.

The MSRB put out its Request for Information in December, and said it wants comments by March 8. It's an issue that Mark Kim, the MSRB's chief executive officer, flagged back in September as ESG munis were headed for a banner year: Issuance of green debt alone, the largest part of the muni ESG segment, totaled a record $24.6 billion in 2021, data compiled by Bloomberg show. But one analysis last year found that borrowers don't disclose relevant data consistently or effectively, such as risks related to the environment.

The regulator's request for comment contains the word "standard" or a variation at least nine times. It also uses terms such as uniform and metrics. So you can see where this may be going — ultimately, the establishment of disclosure standards.

Right now, as is typical in the municipal market, everything is optional. The MSRB reminds readers that it is charged with enhancing both issuer and investor protection and "the overall fairness and efficiency of the municipal securities market." So the current state of affairs will never do, at least according to the MSRB.

Self-Styled Issuance

I blame green bonds for the regulatory interest in this topic. The securities are increasingly common in the U.S. corporate market, where investors are pushing for more sustainable debt. Municipal borrowers began offering them in 2013, when Massachusetts sold $100 million in self-styled green bonds to pay for improvements to water quality, energy efficiency and pollution control, according to the MSRB website.

Now, I always saw most munis as green bonds, used to improve the environment in some fashion. The key term in that description in the paragraph above was "self-styled." States and local governments seemed eager enough to slap the green label on certain bond issues, and when you'd ask them about it, about who decided what was a green bond, it turned out that they did. It was a

marketing tool, and if certain investors were willing to go out of their way to buy a municipal bond labeled “green,” well, terrific! There was no standard to it, no independent verification. At least, not at the beginning, and even now, not uniformly.

As the MSRB’s request makes clear, that may be about to change.

“Many investors and other market participants are seeking ESG-related information beyond what historically has been provided to the market. In response, private vendors are offering ESG certification services.” And you can stop right there. Once there’s a multiplicity of sources for information, there’s the possibility that some investors will get more or better information than the legally required disclosures in offering documents. The MSRB request lists five private vendors who currently certify green bonds, including Build America Mutual, Kestrel Verifiers and Sustainalytics.

And then toward the end of the request, the MSRB asks bluntly whether the ESG indicator from IHS Markit that it has incorporated on its EMMA website’s new-issue calendar enhances market transparency. And then it asks, “What improvements could the MSRB make to the EMMA website regarding ESG-Related Disclosures, ESG-Labeled Bonds and other ESG-related information?”

Best Practices

The Government Finance Officers Association in 2021 released best practices concerning ESG disclosure, and best practices aren’t just concocted overnight, so I asked them about it. Keep in mind that the MSRB in a footnote in its request quotes the GFOA as citing the impracticality of developing uniform metrics to gauge risks.

“One thing that stood out to us is the RFI at times tends to blur the bright line that exists between two things: 1. ESG disclosures on everyday bonds issued and 2. Designated Bonds (i.e. green or social bonds) which are designed to be issued for specific purposes,” wrote Emily Swenson Brock, director of the GFOA’s Federal Liaison Center, in an email. “We will do our best to clarify that bright line (by pointing to our best practices here) and provide the MSRB ideas on how the municipal bond industry can work together to advance issuer awareness and practice in ESG.”

And Dave Erdman, Wisconsin’s capital finance director and a member of the GFOA Debt Committee, said in an email, “Yes some metrics or standardization of criteria and requirements that must be met to have designated bond (such as green, social, etc) would be beneficial to all, in other words, everyone is playing the same game and aiming for the same fences when designating a bond, but do we really want to open the regulatory and reality door on standardization of disclosure language?”

It’s clear that the age-old fight between the analysts who want more and issuers who already feel beleaguered by their demands is about to enter a new phase.

Bloomberg Markets

By Joseph Mysak Jr

January 5, 2022, 9:45 AM PST

— With assistance by Danielle Moran

(Joe Mysak is a municipal market columnist who writes for Bloomberg. His opinions do not necessarily reflect those of Bloomberg LP and its owner, and his observations are not intended as investment advice.)

NFMA's Diversity, Equity & Inclusion Initiatives.

The DEI Committee began work in 2021 on initiatives to promote Diversity, Equity & Inclusion in the NFMA. The first priority was to propose a new mission statement to be incorporated into the NFMA constitution. Effective December 27, 2021, the NFMA's constitution was amended with the new mission statement. To read the current NFMA constitution, click here.

For a better understanding of the goals of the DEI Committee, watch this short report by Anne Ross, 2021 NFMA Chair, Neene Jenkins and Nicole Byrd, Co-Chairs of the DEI Committee. For more information about the NFMA's DEI initiatives click here.

IRS and Treasury Guidance On the Transition From Interbank Offered Rates to Other Reference Rates.

Read the guidance from the IRS and Treasury.

IRS and Treasury Release Final Guidance on Libor Transition.

The Internal Revenue Service and Department of the Treasury have released final guidance on the transition away from Libor, setting Secured Overnight Financing Rate as an alternative and creating noncovered modification in the place of fair-value.

The cessation of Libor matters to the muni market because existing debt and contracts may reference it, potentially impacting variable-rate debt, swaps and contracts, among other things.

The final regulations hope to swap out the Libor rate that is no longer being published as of Dec. 31, 2021, but will be around until June 2023, with a new formula that won't change the economics of the deal or cause reissuance of the particular debt.

"It seems to follow pretty closely the recommendations of the Alternative Reference Rates Committee, the New York Fed group that's overseeing the Libor transition and it seems to provide needed flexibility for municipal issuers who may need to change the terms of outstanding deals in order to accommodate the loss of Libor without having to undergo a reissue," said Michael Decker, senior vice president of federal policy and research at the Bond Dealers of America.

"I think that's the main thing that the community was looking for and I think it's something that generally the community will be supportive of."

The proposed regulations, released on Oct. 9, 2019, leaned on fair market value to ensure the value of the debt stayed the same.

"How do you differentiate changes that are just swapping out the old formula for the new formula?," said Johnny Hutchinson, partner at Squire Patton Boggs and member of the National Association of Bond Lawyers' board of directors. "The way that the Proposed Regulations tried to do that was to say, the fair market value of your debt has to be the same, both before and after the change."

“But people get very skittish when you hand them a certificate signed that says these bonds are being sold at fair market value,” he said.

Muni market participants often say that calculating marked-to-market fair-value poses challenges for municipal bonds because they don’t often trade every day as stocks do. SOFR was another safe harbor outlined in the Proposed Regulations but has been somewhat controversial due to the short history of the formula being published, Hutchinson said.

With the final regulations, set to be published in the Federal Register on Jan. 4, the SOFR rate is mentioned as a qualified rate.

“A qualified rate is a SOFR-based rate or other qualified replacement rate, so long as it is in the same currency as the discounted IBOR or is otherwise reasonably expected to measure contemporaneous variations in the cost of newly borrowed funds in that currency,” law firm Cadwalader Wickersham & Taft said.

But satisfying the requirements with a constant fair market value has been changed.

“That requirement has been completely scrapped, it looks like from an initial read,” Hutchinson said. “Instead, the way that the Final Regulations are going to test whether the parties are really making changes beyond just swapping in a new formula for the old formula, is there are a list of what are called noncovered modifications and they all relate to changes in the timing or amounts of the cash flows on the debt.”

The shift in approach basically says as long as you don’t make these specific noncovered modifications, the IRS or Treasury won’t inquire as to whether the fair market value is the same.

But some modifications to existing agreements may include both covered and noncovered components, which should be tested on a standalone basis, the regulation says. In a way, this makes things a bit more definitive for bond counsel as when a modification event occurs, they’re able to pull up the list of noncovered modifications and see whether the specific event falls under it.

But still some uncertainty exists as bond counsel familiarize themselves with the long list of noncovered modifications. “If that’s how the regulations work, I think that’s a good thing,” Hutchinson said. “It’s helpful and it allows us to apply the rules with, a little bit more certainty than we had before.”

For issuers, this may result in additional time and money spent with bond counsel. “That’s what the attorneys do, they have to test whether or not they can be qualified,” Emily Swenson Brock, director of the federal liaison program at Government Finance Officers Association. “It’s hard because that adds a lot of cost and it adds a lot of time.”

There is currently legislation passing through Congress that could affect that would allow for non-penalized modifications to outstanding contracts when LIBOR ceases to exist in June 2023. It passed the House in December in a 415-9.

It follows New York State legislation that hopes to minimize disruptions by allowing “tough legacy” contracts or those that expire after June 2023 and do not have fallback language specifying an alternative to use SOFR.

In a letter to Speaker of the House Nancy Pelosi and Republican Leader Kevin McCarthy GFOA and many other industry groups hoped to tip the scale in the industry’s favor. “Without federal legislation to address these contracts, investors, consumers, and issuers of securities may face years

of uncertainty, litigation, and a change in value," the letter said. "This would thereby create ambiguity that would lead to a reduction in liquidity and an increase in volatility."

By Connor Hussey

BY SOURCEMEDIA | MUNICIPAL | 02:58 PM EST

NFMA's New Mission Statement Approved.

Effective December 27, 2021, the NFMA's constitution was amended to incorporate a new mission statement. To read the current NFMA constitution, click here.

NFMA Municipal Analysts Bulletin - December 2021

Volume 31, No. 3 of the NFMA newsletter is available by clicking here. Also, please click here to read the special edition of the NFMA Municipal Analysts Bulletin, dated October 26, 2021. This special edition was published to provide NFMA members notification that the NFMA Board of Governors have approved a change to the NFMA mission statement, which represents an amendment to the NFMA Constitution. The proposed amendment is subject to a 60-day comment period by NFMA Regular Members.

RBC Paying $1M FINRA Settlement for Years of Junk Bond Oversight.

A brokerage firm accused of failing to track "junk bond" overconcentration in customer accounts for years has agreed to pay $1 million to settle with FINRA.

The regulator has sanctioned RBC Capital Markets, a New York-based broker-dealer with 2,400 registered representatives in its 275 branch offices, in a case involving potentially unsuitable concentration levels of high-yield bonds in customer accounts between July 2013 and June 2016.

During that period, RBC did not implement a supervisory system to comply with FINRA and Municipal Securities Rulemaking Board rules related to recommendations of high-yield corporate and municipal bonds, according to a letter of acceptance, waiver and consent from FINRA.

As a result, the firm failed to flag more than 100 customer accounts with conservative profiles for this kind of activity.

Additionally, FINRA officials said they have repeatedly reminded member firms of their sales practice obligations in connection with high-yield or "junk" bonds because of the increased risks. These bonds receive lower credit ratings, indicating a higher risk of default.

In settling the case without admitting or denying the charges, RBC agreed to a censure, $456,155 plus interest in restitution and a $550,000 fine. The case originated from a FINRA cycle examination of RBC.

According to the FINRA letter, RBC changed the tax coding of municipal bonds in its system in July 2013. This coding change inadvertently disabled alerts to identify potential concentration issues for further assessment.

RBC did not detect that the alerts were not working, in part, because the firm did not test its alerts during the relevant period, the FINRA letter alleges.

The defective alerts were discovered in September 2015, but the firm allegedly did not address the issue until July 2016. RBC is accused of failing to adopt alternate measures to identify potentially unsuitable concentrations in high-yield bonds and failing to tell supervisors that the alerts were not working as intended.

John Gebauer, president of the compliance firm National Regulatory Services, said this case highlights the importance of thoroughly testing written supervisory policies and procedures as part of the annual 3120 review.

“It appears that RBC thoughtfully designed a supervisory control system and implemented automated controls to ensure that the policies were followed,” Gebauer said. “However, when firms implement a technology-based solution, that does not eliminate the need to regularly test the systems to be certain that they are operating as intended. Whether by bug or changing requirements.

“This unquestioning deference to the results of technology is, unfortunately, an increasingly common occurrence.”

In a number of the impacted accounts, the holdings in high-yield bonds were more than six times the thresholds set by the firm, according to the FINRA letter.

“For example, Customer M, who was over 100 years old, was a trustee for two trust accounts, both of which had the most conservative investment objectives. By June 2015, 86% of one trust account and 100% of the second trust account consisted of high-yield municipal bonds,” said the FINRA letter.

The regulator then described another customer who was more than 70 years old and had a joint account with a conservative investment objective that, at times, consisted of as much as 92% in high-yield bonds.

Financial Planning has reached out to RBC Capital Markets for comment.

Financial Planning

By Justin L. Mack

December 21, 2021

FINRA Fines RBC Over $280,000 for Violating Muni Rule.

RBC Capital Markets, LLC agreed to pay more than $280,500 to settle Financial Industry Regulatory Authority charges that it violated the Municipal Securities Rulemaking Board’s suitability rules when it failed to establish, maintain, and enforce a supervisory system with respect to high-yield municipal bonds.

In a December 14 Letter of Acceptance, Waiver and Consent (AWC), RBC agreed to pay a total fine of $550,000, plus restitution and interest of over $450,000 and to be subject to a censure.

In so doing, RBC neither admitted nor denied FINRA's findings that it violated NASD Rule 3010(a) and 3010(b) and FINRA Rules 3110(a) and (b) and 2010 with respect to the firm's supervision of high-yield corporate bonds, and MSRB Rules G-27(b) and (c) with respect to high-yield municipal bonds.

Specifically, FINRA found that for a period of three years, from July 2013 to June 2016, RBC, which has been a FINRA regulated broker-dealer since 1993, failed to identify for review, more than 100 customer accounts that had conservative profiles for potentially unsuitable concentration levels of high-yield bonds, i.e., those with a higher risk of default.

Under MSRB Rule G-27(b), municipal dealers are required to establish and maintain a supervisory system, which includes written supervisory procedures that reasonably ensure compliance with applicable securities laws.

FINRA Rules 2111 and 3110(a) have similar requirements for supervision, diligence and suitability. For example, under FINRA Rule 2111, member firms must have a "reasonable basis to believe that a recommended securities transaction or investment strategies is suitable for a customer based on information obtained through reasonable diligence of the firm."

In this case, FINRA found that RBC's supervisory system did not flag recommendations that resulted in potentially unsuitable concentrations of high-yield bonds in certain customer accounts. FINRA also concluded the firm's procedures did not sufficiently address suitability factors that its representatives should consider before recommending high-yield bonds.

For example, FINRA said that for a number of years, RBC's procedures did not provide guidance as to what proportion of a customer's portfolio should be invested in those high-risk products.

Additionally, FINRA found that RBC had daily and monthly recommended automated alerts designed to identify potentially unsuitable concentrations of high-yield bonds. However, FINRA concluded the alerts did not function as intended because RBC changed the tax coding of municipal bonds in its system in 2013.

The change "inadvertently disabled the ability of the high-yield bond alerts to identify concentration issues for further assessment," FINRA said.

Additionally, FINRA concluded that RBC did not test its alerts and so was not aware the system wasn't functioning properly. According to the AWC, the firm realized the problem in 2015, but did not fix the system until 2016 and failed to adopt alternate measures to identify potentially unsuitable concentrations in customer accounts in the meantime.

As a result, FINRA found that RBC "did not review more than 100 conservative customer accounts for potentially unsuitable concentrations of high-yield corporate and municipal bonds." Some of those accounts contained high-yield bond concentrations more than six times higher than the thresholds set by the firm.

Consequently, FINRA charged RBC with failing to establish, maintain and enforce a supervisory system reasonably designed to achieve compliance with the relevant MSRB rules and imposed a censure, fine, and restitution and interest as sanctions.

Regarding the AWC, Nicole Garrison, director of corporate content, communications and social

media for RBC Wealth Management-U.S., said, “we are deeply committed to careful management of the wealth clients entrust to us. As a firm, we pride ourselves on having strong policies and procedures in place to protect our clients. In the rare instance those policies and procedures fall short, we take steps to address them.”

Garrison added, “We fully cooperated with FINRA and are pleased to have amicably resolved this case. This matter involves restitution to just 20 accounts and an issue that occurred and was fixed more than five years ago.”

By Kelley R. Taylor

BY SOURCEMEDIA | MUNICIPAL | 12/16/21 01:59 PM EST

MSRB EMMA Update to CUSIP Groups Feature.

Issuers – we heard you. In response to stakeholder feedback the MSRB has introduced a completely redesigned “CUSIP Groups” feature that allows issuers to save a group of CUSIPs to use for future disclosure filings submitted to the EMMA.

Watch our tutorial.

MSRB RFC: New Draft Rule G-46

The MSRB is requesting a second round of comments on a new draft Rule G-46 to codify obligations of solicitor municipal advisors. Comments are due March 22, 2022.

Read the request for comment.

MSRB Opens Second Comment Period on Regulation of Solicitor Municipal Advisors: Cadwalader

The MSRB requested a second round of comments on revisions to proposed Rule G-46 (“Duties of Solicitor Municipal Advisors”). If adopted, the amendments would codify previously issued interpretive guidance concerning the requirements applicable to solicitor municipal advisors under Rule G-17 (“Conduct of Municipal Securities and Municipal Advisory Activities”) (*see* related coverage).

In response to comments received during the first comment period, the MSRB is revising proposed MSRB Rule G-46 to (i) clarify that solicitor municipal advisors do not owe a fiduciary duty under the Exchange Act to clients in connection with solicitation activities and (ii) conform the rule to certain requirements that apply to non-solicitor municipal advisors and certain solicitations under IAA Rule 206(4)-1 (“Investment Adviser Marketing”).

This new comment period will close on March 15, 2022.

December 16 2021

Cadwalader Wickersham & Taft LLP

Joint Trades Letter in Support of H.R. 4616, the Adjustable Interest Rate (LIBOR) Act.

SUMMARY

SIFMA in a joint letter with other associations, provided comments to the House of Representatives on the passage of H.R. 4616, the "Adjustable Interest Rate (LIBOR) Act," to address "tough legacy" contracts that currently reference LIBOR.

SIFMA signed with the following:

Structured Finance Association (SFA)
Bank Policy Institute
National Association of Corporate Treasurers
Education Finance Council
The Loan Syndications and Trading Association (LSTA)
The International Swaps and Derivatives Association (ISDA)
The Real Estate Roundtable
The Financial Services Forum
Institute of International Bankers
Government Finance Officers Association
Mortgage Bankers Association
Commercial Real Estate Finance Council (CREFC)
Consumer Bankers Association
Investment Company Institute
Institute for Portfolio Alternatives
Independent Community Bankers of America
U.S. Chamber of Commerce, Center for Capital Markets Competitiveness
Housing Policy Council
Student Loan Servicing Alliance
American Bankers Association
The American Council of Life Insurers (ACLI)

SEC Outlines Key Considerations for LIBOR-Linked Muni Securities.

A Securities and Exchange Commission staff statement issued Tuesday reiterates disclosure and fiduciary obligations of issuers and underwriters in light of the forthcoming transition away from Libor. And while those obligations are important, some municipal industry practitioners point to an already existing trend away from Libor-linked transactions.

Earlier this year, Libor's regulator, the Financial Conduct Authority, announced that it will cease the publication of 1-week and 2-month U.S. dollar Libor after Dec. 31, 2021. Remaining U.S. dollar Libors will cease in 2023.

The SEC staff statement "seems to be a restatement of existing obligations and requirements that apply to broker dealers and underwriters, both with respect to their issuer clients and their investor customers," said Michael Decker, senior vice president for research and public policy at Bond Dealers of America.

Decker points out that the statement "really focuses on ensuring that both sides of the transaction understand the risks associated with being involved in a Libor transaction, given that it appears Libor is going away pretty soon."

According to the staff statement, "understanding the potential risks, rewards, and costs is especially important when recommending Libor-linked securities."

The statement also highlights specific considerations for underwriters of primary offerings of municipal securities and those for broker-dealers making recommendations of municipal securities.

For example, SEC staff believe that it would be difficult for a broker-dealer to satisfy its duty of care to customers in a situation where the broker-dealer recommends a Libor-linked security without fallback language.

Fallback language specifies a process for identifying a replacement rate in the event that a benchmark rate is not available.

Essentially, the SEC sees the replacement rate for a Libor-linked security as a factor that generally should be considered as part of a recommendation.

Decker said that while fallback provisions were originally conceived for temporary instances where the Libor wouldn't be published for a short period of time, the provisions have now become more robust.

"They account for the notion that Libor may go away entirely and specify a more practical and workable kind of long-term solution," Decker said.

For example, Decker pointed out that instead of merely specifying the prime rate for some period of time, a Libor-transition fallback provision would specify the SIFMA index or some alternative index that the issuer and other parties to the transaction could use.

Regarding municipal securities underwriting, the SEC staff statement pointed to prior SEC staff guidance and guidance from the Municipal Securities Rulemaking Board concerning fair dealing requirements under MSRB Rule G-17.

The Office of Municipal Securities staff noted that "broker-dealers should consider the impact that the Libor transition may have in connection with other duties" including suitability standards in MSRB Rule G19 and disclosure rules under MSRB Rule G-47.

The SEC staff statement also reminds funds and advisors to monitor and manage conflicts of interest associated with the Libor transition.

Les Jacobowitz, a partner at Arent Fox, LLP who has extensive experience representing issuers, borrowers, underwriters, and financial institutions, has been writing about the Libor transition for a couple of years.

"As the UK FCA and U.S. regulators admonish, everyone should act now to slowUSD LIBOR use for the next four weeks through the year-end Libor/SOFR [Secured Overnight Financing Rate] transition

deadline," Jacobowitz wrote Dec. 1.

Jacobowitz also noted that slowing of Libor use was "a recommendation and not a requirement."

However, with a nod to the classic movie, Casablanca, Jacobowitz says he is, "shocked, shocked" that Libor-linked instruments are still being recommended by underwriters and financial advisors.

"I can't believe issuers and conduit borrowers are still entering into Libor-based instruments, especially those that terminate after USD LIBOR goes away [in June 2023]," Jacobowitz explained.

Meanwhile, with respect to both interest rate swaps and floating rate notes, Decker is seeing notable movement away from Libor.

"There may be some new transactions that are still priced off of Libor, but it's my understanding that those are becoming rarer and rarer," Decker said.

Overall, Decker believes that underwriters, municipal advisors, and sales reps should be clear in their disclosure with customers and clients about Libor going away and about specifics of a transaction.

"In that sense, we agree with the SEC that disclosure and transparency are important," Decker said.

The Bond Buyer

By Kelley R. Taylor

December 08, 2021, 1:06 p.m. EST

SEC Staff Statement on LIBOR Transition - Key Considerations for Market Participants.

Read the SEC Staff Statement.

Staff of the U.S. Securities and Exchange Commission

Dec. 7, 2021

SEC Staff Issues Key Considerations on LIBOR Transition: Latham & Watkins

As a major LIBOR transition milestone approaches, a Staff Statement provides key considerations for market participants regarding their obligations.

On December 7, 2021, the Staff of the Securities and Exchange Commission (SEC) issued a statement (the Statement) on the transition away from the London Interbank Offered Rate (LIBOR). The transition away from LIBOR is reaching an inflection point as the publication of the USD LIBOR benchmark for the 1-week and 2-month USD LIBOR maturities and many non-USD LIBOR maturities cease immediately after December 31, 2021.[1] The SEC, like other regulators around the world, continues to emphasize its expectation that market participants understand the risks associated with

LIBOR transition and take appropriate action to move to alternative rates in a manner that protects customers, counterparties, the firm itself, and the capital markets more broadly.

The Statement provides guidance for broker-dealers and registered investment advisers as they approach the imminent transition away from LIBOR, highlighting as part of conduct risk their duties under Regulation Best Interest (Reg. BI) as well as fiduciary obligations under the US securities laws. Specifically, the Statement includes timely reminders for:

- Broker-dealers recommending LIBOR-linked securities
- Broker-dealers underwriting or recommending municipal securities
- Investment advisers recommending LIBOR-linked securities
- Funds and investment advisers investing in LIBOR-linked securities
- Companies and issuers of asset-backed securities making disclosures related to the LIBOR transition

Obligations for Broker-Dealers Under Reg. BI

According to the Statement, broker-dealers should be mindful of their obligations under Reg. BI when recommending LIBOR-linked securities to retail customers. Under Reg. BI's Duty of Care, "a broker-dealer must exercise reasonable diligence, care, and skill to, among other things, understand the potential risks, rewards, and costs associated with the recommendation."

In the Statement, SEC Staff emphasized that based on a fact-specific analysis broker-dealers must have a reasonable basis to believe that any recommendation they make involving LIBOR-linked securities is in their retail customers' best interests. According to SEC Staff, "reasonable diligence" may take into account client investment objectives, as well as the characteristics of the underlying securities such as complexity, risks, rewards, costs, liquidity, volatility, likely performance, expected return, associated incentives, etc.

The Statement clarifies that, to meet the Reg. BI Standard, broker-dealers must confirm whether a security has robust fallback language in its offering documents that clearly defines an alternative reference rate (ARR) to LIBOR. If a security does not have robust fallback language, then the recommendation must be "premised on a specific, identified, short-term trading objective." In contrast, if a security does have robust fallback language, the broker-dealer must assess the impact the replacement rate will have on the expected performance of the security to determine whether the security is still in the customer's best interest.

Furthermore, under Reg. BI, broker-dealers that have agreed to perform monitoring services for a retail customer must reassess the potential risks, rewards, and costs of any LIBOR-linked security in their retail customer's account to ensure the investment is still in the customer's best interests. This obligation applies to buy, sell, or hold recommendations, and even when a broker-dealer remains silent (i.e., an implicit hold recommendation).

Obligations for Broker-Dealers Related to Municipal Securities

In addition to the Reg. BI standard for recommendations to retail customers, broker-dealers are subject to a few additional rules when recommending LIBOR-linked municipal securities.

1. Exchange Act Rule 15c2-12 requires broker-dealers to obtain and review a "deemed final" official statement by a municipal obligor. Per this rule, underwriters must have a reasonable basis to believe the key representations in the "deemed final" official statement are true. To meet this "reasonable basis" standard, broker-dealers underwriting municipal securities should review the

municipal obligor's exposure to LIBOR-transition risks to ensure those risks are adequately addressed in the obligor's key representations.
2. Broker-dealers making recommendations to non-retail customers are subject to the suitability standard in MSRB Rule G-19. Accordingly, broker-dealers should consider a municipal obligor's exposure to LIBOR transition risks when making a suitability determination.
3. When broker-dealers sell or purchase municipal securities, MSRB Rule G-47 requires they disclose material information known or available to established industry sources regarding the municipal obligor's exposure to LIBOR transition risks.

Obligations for Registered Investment Advisers and Registered Funds

SEC-registered investment advisers must consider their fiduciary obligations under the Investment Advisers Act of 1940 when recommending LIBOR-linked securities and investment strategies. These fiduciary principles require advisers to consider whether LIBOR-linked investments are consistent with their client's goals. To do this, advisers must consider whether the investments or related contracts have robust fallback language providing a clear ARR. When an investment does include an ARR, advisers should consider whether those rates will cause the investment to depart from their client's goals or risk tolerance.

Funds and advisers should monitor and manage conflicts arising from the LIBOR transition. Specifically, advisers should make disclosures when the LIBOR transition impacts performance fees, which is likely for performance fees subject to a "hurdle rate" (the minimum return necessary for the adviser to start collecting the performance fee) that is tied to LIBOR.

LIBOR transition also implicates disclosure obligations for registered investment companies and business development companies to prevent misleading investors. Disclosures in offering documents for registered products must address the principal risks associated with the fund, including those related to the anticipated impact of LIBOR transition, if a fund invests a significant portion of its assets in LIBOR-linked investments.

Funds and advisers should also consider the impact the transition will have on valuation measurements that use LIBOR as an input, as well as the operational complexities that the LIBOR transition will introduce on their IT systems.

Obligations for Public Companies and Asset-Backed Securities Issuers

According to the Statement, public companies and asset-backed securities issuers should provide meaningful insight to investors about the status of their efforts to address LIBOR transition risks. Specifically, companies should provide material and specific qualitative and quantitative information to investors, "rather than general statements about the progress of the company's transition efforts to date." To aid these disclosure requirements, the Statement outlines several specific disclosure recommendations:

- Companies should generally disclose the steps they have taken to identify their LIBOR exposure, what the company has done thus far to mitigate LIBOR transition risks, and what steps remain to mitigate those risks.
- Companies with outstanding debt that lacks robust fallback provisions should disclose how much LIBOR-linked debt they will have outstanding after the cession date and the steps the company is taking to mitigate the risks involved.
- Companies that include disclosures about the LIBOR transition in response to more than one disclosure requirement within a single filing should provide cross-references or otherwise connect the information to clarify for the investor the company's LIBOR risk profile.

- Firms specifically subject to regulatory guidance (such as the joint statements issued by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation; and the Federal Reserve Board backed Alternative Reference Rates Committee) recommending that they avoid entering into new contracts that reference LIBOR after December 31, 2021, should disclose the details of their transition efforts and the impact of these efforts on their company, in alignment with such guidance.

Key Takeaways

The Statement's recommendations will be of particular interest to firms and individuals under the SEC's remit, as they may be indicative of the Staff's key regulatory and examination priorities. Since at least June 18, 2020, the SEC's Division of Examinations has highlighted that LIBOR transition is a priority, including when it issued a Risk Alert on LIBOR transition preparedness (see this Latham post for more information). As the long-anticipated deadline for key LIBOR tenors approaches, regulated firms should be alert to their various disclosure obligations and obligations under the fiduciary rules and Reg. BI. Firms should prepare for compliance with these rules, specifically as they relate to LIBOR transition.

Latham & Watkins LLP – Laura N. Ferrell, Marlon Q. Paz, Zach Lippman and Deric M. Behar

December 10 2021

MSRB RFC: ESG-Related Disclosure and ESG Labeling

Share Your Perspective on ESG Practices in the Muni Market

Read the MSRB's request for information on ESG-related disclosure and ESG labeling, and submit your comments
by March 8, 2022.

December 8, 2021

MSRB Requests Information on ESG Practices: Cadwalader

The MSRB issued a Request for Information on environmental, social and governance ("ESG") practices in the municipal securities market. MSRB is seeking information on (i) the disclosure of related risk factors and practices, and (ii) the labeling and marketing of municipal securities with ESG designations. Responses must be submitted by March 8, 2022.

Specifically, MSRB is asking the following questions:

Municipal Issuers:

- Are you currently providing ESG disclosures or information beyond what is legally required in your offering documents?
- Do you believe that the information in the ESG disclosures should be standardized?

Investors in Municipal Securities:

- Do you consider ESG information material to your investment decision?
- Do you have access to ESG-related information to make an informed investment decision?

Dealers:

- Does underwriting ESG-labeled bonds create any novel compliance issues? How might that differ between a primary offering and purchase or sale in the secondary market?

Municipal Advisors:

- Does the formulation and delivery of advice for ESG-related bonds and ESG-related disclosures raise any novel compliance challenges?

All Municipal Market Participants:

- Are there any ESG factors that could pose a systematic risk to the municipal market?
- There are organizations that have established voluntary standards; do those standards provide adequate guidance and transparency for investors?

Cadwalader Wickersham & Taft LLP

December 8 2021

MSRB Extends Comment Deadline on Draft Compliance Resources for New Issue Pricing: Cadwalader

The MSRB extended the deadline for comments on draft compliance resources related to new issue pricing. The comment deadline was extended from January 4, 2022 to January 19, 2022.

As previously covered, one proposed compliance resource would focus on underwriting activity under MSRB Rule G-17 ("Conduct of Municipal Securities and Municipal Advisory Activities") and supervisory obligations under MSRB Rule G-27 ("Supervision"). The second resource would focus on duty of care obligations under MSRB Rule G-42 ("Duties of Non-Solicitor Municipal Advisors") and non-solicitor municipal advisors' duties under MSRB Rule G-44 ("Supervisory and Compliance Obligations of Municipal Advisors").

Cadwalader Wickersham & Taft LLP

December 7 2021

SEC Charges Adviser with Section 204A Violation for Failing to Maintain MNPI Procedures: Paul Hastings

Recently, the SEC settled an enforcement action against a registered investment adviser (the "Adviser") for allegedly failing to implement policies and procedures reasonably designed to prevent the misuse of material non-public information ("MNPI") in violation of Section 204A of the Investment Advisers Act of 1940 ("Section 204A"). The terms of the settlement required the Adviser to pay an $18 million penalty. Although the SEC's pursuit of violations of Section 204A is nothing

new, this action is significant for a couple of reasons.

First, the SEC's allegations focused on policies and procedures governing advisory personnel who were considered "above-the-wall" in relation to the Adviser's MNPI informational barriers. Specifically, although the Adviser had instituted walls that prohibited certain personnel from obtaining MNPI from the Adviser's affiliates, the Adviser allegedly had no procedures or "walls" that governed senior personnel who sat on the Adviser's Investments Committee (i.e., in a position above the informational walls) and ratified investment decisions for the Adviser. Those senior individuals also allegedly "had access to" MNPI about many of the issuers in which the Adviser invested through their work as consultants acting on behalf of the Adviser's affiliates.

Second, the SEC's allegations suggest that the agency is willing to take an aggressive view when determining what type of information might constitute MNPI for the purpose of Section 204A. Here, the SEC classified information relating to the Adviser's internal investment strategies and allocations as "MNPI" for the purposes of Section 204A. In other words, the SEC considered the procedures the Adviser had in place to prevent the misuse of information relating to the Adviser's own investment holdings and allocations in determining whether the Adviser's policies were adequate under Section 204A. Traditionally, the SEC has not designated this type of information as MNPI for the purposes of Section 204A. Further, some of the information at issue related to municipal debt securities, which are rarely, if ever, the subject of SEC insider trading claims.

Background: Senior Advisory Personnel Wore Many Hats and Sat Above the "Wall"

According to the SEC, the Adviser invested the vast majority of its funds indirectly through third-party investment managers who maintained discretion over the funds. Some of these indirect investments were held in separately managed accounts ("SMAs"). The SEC alleged that the Adviser was aware of the SMAs' holdings and activity because the Adviser maintained books and records of all trades executed by the third-party managers in the SMAs. The SEC also alleged that the Adviser had insight into certain details regarding the holdings in the remaining portion of the indirect investments because the Adviser had access to, among other things, client updates that it received from the third-party managers.

The SEC alleged that the Adviser managed the money of the partners and personnel of the Adviser's parent company ("Parent"), a large consulting company. To help manage the money, the Adviser apparently formed an Investments Committee that was responsible for overseeing and monitoring all investments. The Investments Committee was allegedly responsible for ratifying or approving investment decisions, including planned allocations to third-party managers. The SEC alleged that members of the Adviser's Investments Committee also separately provided consulting services to public companies and entities emerging from bankruptcy on behalf of the Parent.

Among other things, the SEC alleged that the Adviser invested hundreds of millions of dollars in the securities of issuers about which members of the Investments Committee had access to substantial MNPI as a result of the consulting services that those individuals performed on behalf of the Parent. For example, the SEC alleged that the Adviser's Investments Committee allocated millions of dollars in investments to a third-party manager that substantially invested in a public company ("Company A "). The SEC alleged that, at the same time, a member of the Investments Committee was responsible for overseeing the strategic and corporate advice that the Parent was then providing to Company A. The SEC indicated that, given this type of conduct, the "risk of misuse of MNPI was real and significant."

The SEC alleged that the Adviser did not have policies and procedures to address this risk and prevent the misuse of MNPI to which members of the Investments Committee had access.

SEC Classifies the Adviser's Internal Investment Decisions as "MNPI"

The SEC also alleged that the Adviser lacked policies and procedures to prevent the misuse of MNPI relating to the Adviser's own internal investment decisions. Specifically, the SEC alleged that members of the Investments Committee were "aware of MNPI regarding [the Adviser's] investment strategies, concentration limits, risk limits, and third-party managers allocations, and had access to [the Adviser's] holdings," including holdings of securities that are very infrequently the subject of SEC insider trading claims, such as municipal bonds and private senior secured debt for an issuer in bankruptcy proceedings.

The SEC claimed that, armed with this MNPI regarding the Adviser's investment positions, members of the Investments Committee might be tempted to engage in conduct designed to influence those investments. For example, the SEC suggested that members of the Investments Committee might influence their consulting advice in a way that favored the Adviser's investments, given the overlap between the issuers for which the members of the Investments Committee provided consulting services and the issuers in which the third-party managers made investments. Notably, the SEC did not allege that any of the members of the Investments Committee actually tried to influence the investment decisions in an improper way. Nonetheless, the SEC alleged that the Adviser did not have policies and procedures in place to prevent the misuse of this "MNPI."

The Takeaways

This action presents many takeaways and reminders for registered broker-dealers and investment advisers:

- A violation of Section 204A does not require an allegation of insider trading
- According to the SEC, a "risk" of misuse of MNPI is sufficient to substantiate a finding that policies and procedures are not reasonably designed
- From the SEC's perspective, a potential violation of Section 204A may be predicated on an individual merely having "access to" MNPI
- The SEC might allege that MNPI includes internal advisory decisions regarding a potential investment, which might significantly complicate an adviser's/broker-dealer's efforts to design procedures to prevent the misuse of MNPI under the federal securities laws
- "Above-the-wall" procedures must be considered when implementing informational barriers to prevent the misuse of MNPI
- Wearing many hats can lead to complex issues regarding MNPI policies and procedures under Section 204A

Paul Hastings LLP – Thomas A. Zaccaro , Nick Morgan, John P. Nowak and Jessica Baker

December 2 2021

Recognition and Measurement in Governmental Funds and added Illustrative journal entries for issuance and refunding of bond anticipation note.

Revamped Chapter 20 – Postemployment Benefits:

- Topics reorganized to reflect the various types of postemployment benefit plans.
- Relocated and expanded note disclosure content to include all requirements for all types of trusted defined benefit plans, all non-trusted defined benefit and defined contribution plans, and nonemployer contributors.
- Added accounting and financial reporting for nongovernmental cost-sharing pension plans.

Added a new Chapter 27, with expanded discussion of accounting for leases, PPPs, and SBITAs, including determining the terms (length) of the agreements and measuring assets, liabilities, deferred inflows and outflows of resources, and inflows and outflows of resources recognized for each type of arrangement.

Incorporated detailed note disclosure requirements for:

- Subscription-based information technology arrangements (SBITAs)
- Public-private and public-public partnerships (PPPs) and availability payment arrangements (APAs)
- In-substance defeasances of debt using only existing resources, and
- Minority-share asset retirement obligations.

Expanded discussion of note disclosure and actuarial section requirements for reporting by pension and OPEB plans.

Provided guidance for governments transitioning their reference rate(s) from an interbank offering rate, including LIBOR based on GASB Statement No. 93.

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The new electronic *GAAFR* has been updated to incorporate all new authoritative guidance through GASB Statement No. 97, and GASB's Implementation Guide updates through June 30, 2021, and much more. Note: All current *GAAFR Plus* subscribers will receive the publication as part of their subscription. Not a *GAAFR Plus* subscriber? Pre-order by December 31 and receive a four-month trial to *GAAFR Plus*.

SEC Names New Acting Director of the Office of Municipal Securities.

The Securities and Exchange Commission (SEC) named Ernesto Lanza as its acting director of the Office of Municipal Securities (OMS).

Lanza replaces Rebecca Olsen, who was named deputy chief for the Division of Enforcement's Public Finance Abuse (PFA) Unit. Mark Zehner, who held the PFA role since July 2010, is retiring from the agency after 25 years of service.

"I look forward to working closely with Ernie on oversight of municipal securities," SEC Chair Gary Gensler said. "This critical $4 trillion market finances local governments and the essential infrastructure of our communities, such as roads, hospitals, and schools. I thank Rebecca for her leadership of OMS since 2018 and congratulate Mark on his retirement from the SEC."

Lanza has served as senior counsel to the OMS director since 2019. Before that, Lanza was in private practice focusing on public finance matters related to securities law, disclosure, and market structure issues. Previously, he served as the deputy executive director of the Municipal Securities Rulemaking Board (MSRB), where he led several policy initiatives, including the launch of the EMMA system. Prior to that, Lanza was the MSRB's chief legal officer and general counsel. He holds a J.D. from the University of Pennsylvania Law School and earned his undergraduate degree cum laude from Harvard University.

Olsen became head of OMS in September 2018. She previously served as the deputy director, chief counsel, and attorney fellow in the office. She earned a bachelor's degree from Boston College, a J.D. from the Georgetown University Law Center, and an LL.M in International Business Law from the Vrije Universiteit Amsterdam, The Netherlands.

Zehner joined the SEC in January 1997. Before joining the Enforcement Division, he served as Regional Municipal Securities Counsel in the SEC's Philadelphia Regional Office and as an attorney-fellow in OMS. Zehner received a J.D. from the University of Pennsylvania Law School and a B.A. from Dartmouth College. He won the Stanley Sporkin Award in 2006, the agency's highest honor for enforcement staff.

FINANCIAL REGULATION NEWS

BY DAVE KOVALESKI | DECEMBER 7, 2021

Retired SEC Enforcer Zehner Reflects on Landmark Muni Cases.

Mark Zehner spent 25 years dropping the hammer on municipal securities wrongdoers, helping to firmly establish the Securities and Exchange Commission's enforcement of the laws in the muni market.

His career saw the SEC bring cases against negligent issuers and audacious fraudsters, broker-dealers and bond lawyers. He still views the municipal market as a place populated overwhelmingly by good people.

"Fundamentally, the vast majority of muni issuers are trying to do the right thing," Zehner said. "The vast majority of underwriters and municipal advisors are trying to do the right thing."

Zehner, 62, retired as the deputy chief of the SEC's public finance abuse unit at the end of November. He talks quickly and laughs easily, but there's no mistaking how seriously he has taken the work to which he devoted the majority of his professional life. He can recall the details of cases dating back 15 or more years, and he speaks about them with clear conviction.

"We call 'em like we see 'em," he said.

Zehner began his SEC tenure in 1997 as an attorney fellow in the SEC?s Office of Municipal Securities, where he got a taste of the life of an enforcer through examining the yield-burning scandal of the 1990s. Working in Washington, D.C., but maintaining his home in Philadelphia, Zehner commuted to and from work by train daily before finding a home in the SEC's Philadelphia office.

Zehner's career as an enforcer spans a number of landmark cases that created precedents in

municipal securities enforcement. In a phone interview shortly after his retirement, Zehner discussed a number of those cases and offered some thoughts on the future.

The first cases Zehner named as significant were two that he said served as a sort of announcement the SEC wouldn't hesitate to bring charges in the municipal bond space.

The SEC's 2004 action against the Dauphin County, Pennsylvania General Authority saw the commission charge the issuer for failing to disclose to potential bondholders that the tenant responsible for more than half of the parking revenues backing its 1998 bonds had already planned to leave that space at the time the bonds were issued. The SEC found this was material to would-be purchasers of the bonds, and should have been included in the official statement.

Around the same time, the SEC also announced an administrative action against broker-dealer L. Andrew Shupe and bond lawyer Ira Weiss for alleged violations of the antifraud provisions of the federal securities laws in connection with a June 2000 offering of tax-exempt notes by the Neshannock Township School District, located in Lawrence County, Pennsylvania.

The SEC found that the true purpose of the offering was a scheme by underwriter Shupe to secure $ 225,000 dollars of arbitrage profits by investing the proceeds for three years without spending them on capital projects, even though the tax-exempt status of the bonds depended on the authority reasonably expecting to spend down the proceeds in that time. The SEC further alleged that Weiss also committed fraud by nonetheless rendering an unqualified opinion the notes were tax-exempt and that nothing had come to his attention to lead him to believe the offering documents were inaccurate.

The case against Weiss became a months-long affair of appeals, eventually ending with the SEC's triumph in the U.S. Court of Appeals for the District of Columbia.

These cases served as an announcement of the SEC's readiness to act when it saw cause, Zehner said, while other cases established still more precedents.

Perhaps no enforcement pursuit of Zehner's career created quite as much of a muni market splash as the Municipalities Continuing Disclosure Cooperation Initiative, or MCDC. Launched in March 2014, the MCDC promised underwriters and issuers lenient settlements if they self-reported instances where issuers falsely said in offering documents they were in compliance with their continuing disclosure agreements.

The initiative was the brainchild of then-SEC enforcement lawyer Peter Chan, who is now in private practice. But Zehner said the MCDC, like all of the muni actions of the past decade, was a triumph of the work of the whole public finance abuse unit.

"That was an incredible team effort," Zehner said.

The MCDC inspired fierce debate among issuer officials and bond lawyers, some of whom accused the SEC of being too aggressive in targeting issuers. In total, the initiative led to settlements with 72 issuers from 45 states. In addition, 72 underwriters representing 96% of the underwriting market by volume paid a total of $18 million of MCDC settlements.

Zehner said he believes the MCDC, which wrapped up in late 2016, had a positive impact on issuer disclosure practices in the short term. But it remains to be seen whether that will stick, he said.

Zehner said looking forward, one might do well to examine the SEC's orders suspending two former KPMG auditors who approved and authorized the issuance of an unmodified audit opinion on The

College of New Rochelle?s fiscal year 2015 financial statements, despite not having completed critical audit steps and having been given information that raised serious red flags.

The school's controller had already faced SEC fraud charges for overstating the financial position of the now-defunct school. Bond lawyers said the KPMG cases were important, because the action showed that the SEC would hold professionals like auditors accountable for negligence even if they weren't complicit in underlying fraud.

"I think we will see more accounting cases going forward," Zehner predicted.

Zehner was complimentary of both the unit chiefs he served under since the SEC announced the creation of its specialized enforcement units, including what is now the public finance abuse unit, in 2010. Elaine Greenberg led the unit until 2013 when she left to enter private practice, and the unit has since been led by LeeAnn Gaunt.

Zehner's place as deputy chief has been filled by Rebecca Olsen, who had until recently been director of the Office of Municipal Securities.

As described by him, Zehner's future holds a break from the intellectual challenge of securities law. He said he wants to travel and devote more time to his work in the Catholic Church. Much of Zehner's work is through the Saint Vincent De Paul Society, a nearly 200-year old society dedicated to providing help to the needy.

By Kyle Glazier

BY SOURCEMEDIA | MUNICIPAL | 12/09/21 09:03 AM EST

Ernesto A. Lanza Named Acting Director of SEC Office of Municipal Securities.

Washington, D.C.–(Newsfile Corp. – December 3, 2021) – The Securities and Exchange Commission today announced that Ernesto A. Lanza will serve as Acting Director of the Office of Municipal Securities (OMS). Mr. Lanza, who has served as Senior Counsel to the OMS Director since 2019, replaces Rebecca J. Olsen, who was named Deputy Chief for the Division of Enforcements Public Finance Abuse (PFA) Unit. Mark R. Zehner, who held the PFA role since July 2010, is retiring from the agency after 25 years of service.

"I look forward to working closely with Ernie on oversight of municipal securities," said SEC Chair Gary Gensler. "This critical $4 trillion market finances local governments and the essential infrastructure of our communities, such as roads, hospitals, and schools. I thank Rebecca for her leadership of OMS since 2018 and congratulate Mark on his retirement from the SEC."

Prior to joining the SEC in 2019, Mr. Lanza was in private practice with a focus on public finance matters related to securities law, disclosure, and market structure issues. He previously served as the Deputy Executive Director of the Municipal Securities Rulemaking Board (MSRB), where he led a number of policy initiatives, including the launch of the EMMA system. Before that, he was the MSRBs Chief Legal Officer and General Counsel. Mr. Lanza holds a J.D. from the University of Pennsylvania Law School and earned his undergraduate degree cum laude from Harvard University.

Ms. Olsen became head of OMS in September 2018 and previously served as the Offices Deputy Director, Chief Counsel, and attorney fellow. She earned a bachelor's degree from Boston College, a

J.D. from the Georgetown University Law Center and an LL.M in International Business Law from the Vrije Universiteit Amsterdam, The Netherlands.

Mr. Zehner joined the SEC in January 1997. Prior to joining the Enforcement Division, he served as Regional Municipal Securities Counsel in the SECs Philadelphia Regional Office and as an Attorney-Fellow in OMS. He received a J.D. from the University of Pennsylvania Law School and a B.A. from Dartmouth College. In 2006, he received the Stanley Sporkin Award, the agencys highest honor for enforcement staff.

MSRB Staff Examines Change in Use of External Liquidity over Time: Cadwalader

In a new report, MSRB staff examined the use of external liquidity in both "small" ($100,000 or less) and "large" ($1,000,000 or more) secondary market transactions over the past decade. As defined in the report, external liquidity is when "a customer purchase or sale is filled using the offering or bid of a dealer that is different than and not affiliated with the client's dealer."

MSRB staff analyzed how municipal market participants accessed the secondary market of fixed--, long-term securities in the years 2011, 2015, 2019 and 2020. As to small market transactions, from 2011 to 2019, the staff found an increase in external liquidity likely due to the increased use of online brokerages largely by individual investors. (From 2019 to 2020, there was a minimal decrease in small market transactions, likely attributable to the pandemic.) As to large market transactions, the MSRB found a decrease in external liquidity from 2011 to 2019. The researchers identified an increase in large market transactions in 2020. The MSRB concluded that the pandemic had a large impact on external liquidity usage in 2020. The staff researchers found that external liquidity usage varied greatly from month to month, peaking at the beginning of the pandemic and declining throughout the year.

The study also found a consolidation and decrease in the number of providers of external liquidity over the period. (In 2020, the top ten external liquidity providers accounted for 45% of all liquidity in trades, which was up from 42% in 2011). The MSRB suggested that those providers who left the market did not have a significant presence, and the number of firms providing "significant" external liquidity was on the rise.

MSRB staff said it will continue to monitor the use of external liquidity in the marketplace and will update the report when appropriate.

Cadwalader Wickersham & Taft LLP

November 19 2021

Quarterly Report of the GASB Chair.

The GASB Chair reports quarterly on the activities of the GASB to the Financial Accounting Foundation Board of Trustees and the members of the Governmental Accounting Standards Advisory Council.

January 1, 2021–March 31, 2021

Here's One Way to Get the Municipal Bond Market to Come Clean on Climate Change Risks.

The SEC might consider offering issuers a grace period before cracking down, this firm suggests

As climate change continues to take a toll on the built environment in the United States, investors are often in the dark about its effects. State and local governments, which issue roughly $500 billion of bonds each year, are being urged to be more proactive about addressing climate change, as MarketWatch has reported.

Now, a new proposal from a longtime muni-bond research firm offers a suggestion for regulators focused on climate risks and looking to encourage municipal issuers to be more upfront with buyers of their bonds.

The solution: "a Climate MCDC program that allows muni borrowers not making sufficient disclosure of their material credit vulnerabilities via climate change a short period to officially post the related information they possess," wrote analysts at Municipal Market Analytics in a Nov. 22 report.

MCDC stands for "Municipal Continuing Disclosure Cooperation," and it refers to a successful 2014 initiative of the U.S. Securities and Exchange Commission, which offered more favorable terms for any municipal bond issuer willing to voluntarily self-report earlier instances of being out of compliance with disclosure regulations.

As the Municipal Market Analytics report notes, "In the past month of the MCDC safe harbor window (December 2014), 30 municipal issuers filed their first notices of past technical (23) and monetary (7) defaults. Even considering the COVID-19 pandemic, December 2014 still holds the record for most monthly new impairments since the Great Recession."

MMA President Thomas Doe has been vocal about his skepticism of the municipal bond market's approach to pricing climate-change risk. In a series of interviews with MarketWatch in August, he called migration to the sunshine states of the U.S. "denial": "you may be able to live there for a short period, but it's not going to be a 20-year experience."

Muni-bond defaults are scant: 0.10% compared to 2.25% of all corporate bonds, according to the Municipal Securities Rulemaking Board, but advocates of better disclosure, like Doe, say climate risk is very mispriced. It might take only one bad weather event and one Congress reluctant to keep bailing out states and locals for an issuer to have trouble paying its debts.

Few other public finance observers have been quite as hawkish, but many share some concern that state and local issuers aren't being as candid about the climate risks they face as investors might want — whether deliberately, or unintentionally.

The Nov. 22 note echoed much of what Doe told MarketWatch last summer: to the extent that the muni market needs discipline, it most likely won't come from investors, since market supply and demand are so out of whack.

“Investors urge issuers to disclose ‘more and better information’ about risks, but don’t enforce true market discipline, the analysts wrote.

Yet, “Industry organizations representing issuers are encouraging voluntary disclosure with the hopes of avoiding a future regulatory mandate. But history suggests that efforts to obtain new voluntary disclosures may not generate the participation warranted and ultimately lead to a regulatory response.”

MMA concludes its proposal by noting that there are plentiful, often free, tools for issuers to use to quantify their climate risk. The SEC would be well within its rights to review bond documents to see if they “adequately disclosed reasonably known material risks to investors;” and, more broadly, to “convey its disclosure expectations.”

States are better-positioned to lead these efforts than local governments are, MMA writes, adding: “It is inefficient and not as credible for tens of thousands of local governments— varying in size, sophistication, and resources and many overlapping—to individually assess highly complex data, determine how their tax-bases, revenues, and operations could be impacted, develop resiliency plans, and make appropriate disclosures, all while fighting to retain or grow their respective allocations of local aid as their states decide what to pay for and where.”

MarketWatch

By Andrea Riquier

Nov. 23, 2021

There Are No Municipal-Market Bond Vigilantes When It Comes To Climate Risk, This Study Confirms.

The old saw that municipal bonds don’t default never accounted for climate change

From wildfires to floods, hurricanes to heat, the effects of climate change on our communities are well-known, and widely expected to get worse.

But as participants in the municipal debt market are starting to realize, there are no bond vigilantes to enforce discipline on state and local government issuers. A new study confirms that notion, showing that investors haven’t yet begun to demand any premium for bonds that may be more at risk due to extreme weather.

That means that as weather becomes more volatile, things may have to change: either municipalities will pay more to borrow, or state governments and Washington may increasingly pick up the tab to make bondholders whole.

The report, from climate analytics firm risQ, Inc. analyzed the yields on about 800,000 municipal bonds issued between 2006 and 2021, accounting for about $2.5 trillion of the $3.9 trillion outstanding. “This is an era,” the report notes, “where it is reasonable to assume climate risk was broadly recognized as a potential issue.”

The research process involved making an estimate of the expected yield of all the bonds in the data set, based on factors that are known to influence yield, such as duration of the bond, type of issuer,

and so on. It omitted climate risk as an input. Then, the researchers layered a proprietary climate risk score over the bonds, demonstrating that there is no correlation between climate and any additional risk premia for bonds that was unexplained by the other drivers.

The researchers then reran the same model, using only bonds issued between 2017 and 2021, noting that "physical climate risk came to the forefront of the collective awareness of the market after 2017's hurricane season," which remains the costliest on record.

But they come to the same conclusion with the second experiment: climate doesn't influence yields.

In addition to the data analysis they perform, risQ analysts have some important takeaways about why the municipal market hasn't yet reckoned with climate risk.

Among them is the old saw that muni bonds rarely default. As they note, "compared to other asset classes, municipal bonds have indeed been historically less risky. Because of this, systemic risk in general (climate and otherwise) has not been nearly as central a concern to the world and culture of municipal bonds as it has been to insurance or mortgage-backed security markets."

Another is a belief that climate hasn't historically caused defaults, an argument "that we hear less and less of as the climate crisis worsens," the report notes. They call climate risk "a 'frog in a pot of boiling water' situation, wherein systemic risk is significantly underestimated, and the heat will at least turn up gradually, and maybe abruptly."

What does this mean for investors?

Among other things, risQ repeats some of the themes MarketWatch has reported on in recent months: investors should be aware that the municipal market may have risks that are camouflaged by lopsided supply and demand, issuers with little incentive (so far) to disclose their challenges, and ratings firms and regulatory agencies that may not be as proactive as necessary.

The risQ report concludes with one example of a recent climate catastrophe: the fire in Paradise, California, in 2018, where nearly 90% of the town was destroyed and 90% of the population forced to leave. Despite that, Paradise was able to pay its bondholders, both because of state legislation that allowed California to step in and backfill payments, and because the state was able to secure direct federal aid.

As MarketWatch has previously reported, some observers think the municipal market may not be able to continue to rely on state and federal bailouts, particularly as "hundred year" weather events become every-year occurrences. By the time the frog realizes he's in hot water, in other words, it may be too late.

"Bond issuers will need to prepare for potential 'sticker shock' in many cases — yields don't reflect climate risk yet, but this is almost certainly a matter of when, not if," risQ writes. But the sooner they take proactive steps, the better: addressing the problem is not just good for the overall market, but is considered a "credit positive" as well.

MarketWatch

By Andrea Riquier

Nov. 24, 2021

Implementing the Recommendations of the Task Force on Climate-Related Financial Disclosures (2021)

The 2021 TCFD "Annex" updates and supersedes the 2017 version of "Implementing the Recommendations of the TCFD." It provides both general and sector-specific guidance on implementing the Task Force's disclosure recommendations.

Download report

Increased Investor & Rating Agency Interest in Cybersecurity and Climate Change Disclosure in Municipal Bond Issuances.

The topics of ***Cybersecurity*** and ***Climate Change*** disclosure are generating increased investor and rating agency interest in municipal bond issuances. The Securities and Exchange Commission (SEC) has expressed concerns about the adequacy of such disclosure given the increased frequency of cybersecurity breaches and severe weather-related events and their impact on municipalities' operations. SEC Release on Cybersecurity Disclosure; SEC Statement on Climate-Related Disclosure. Risks related to cybersecurity and climate change may be material to potential investors, and therefore, should be disclosed in bond offering documents.

Cybersecurity

Municipalities, like many other public and private entities, rely heavily on technology to conduct their operations, and as a result, are vulnerable to cyber threats. Yet, many municipal issuers fail to disclose these risks when they could have a material impact on operations due to, among other factors:

- a misunderstanding of the cyber issues by the individuals preparing the disclosures;
- the need to protect and keep private the mitigation measures; or
- uncertainty surrounding the potential impact of the cyber threats.

Lack of disclosure, however, will leave investors wondering whether there have been any threats or attacks and whether any mitigation strategy against such attacks exists at all. Investors want to assess the adequacy of the disclosure for the level of risk and the nature and quality of the management capabilities and mitigation strategies of the issuer. Topics relative to cybersecurity disclosure should include:

- recent cyber-attacks, that did, or could have, a material effect on operations; and
- mitigation strategies against cyber-attacks such as, insurance to protect against such attacks, upgrades to software and policies and committees put in place relating to the security of the network.

Climate Change

While the impacts of climate change have received media attention for many years, consideration of climate change in disclosure documents is a relatively new and evolving expectation. Earlier this year, the SEC created a Climate and Environmental Social Governance (ESG) Task Force to develop initiatives to identify climate and ESG disclosure related conduct. Given the SEC's heightened focus

and that the increase in severe weather may impact state and local tax collections and increase infrastructure costs, municipal issuers should evaluate their current practice related to disclosure of climate risk to ensure that such risks are being vetted and disclosed. Specifically, municipalities should disclose:

- recent weather-related events that had an impact on operations;
- geographic location and what weather events it may be vulnerable to in light of the location such as flooding, wind and/or fires and their potential impact; and
- best practices for monitoring the ever-changing impacts of climate change and any plan for disclosure of such risks for future issuances.

Municipal issuers should consult with the professionals that assist them with their offering documents, including their municipal advisors and disclosure counsel, if any, to ensure that such offering documents include adequate cybersecurity and climate change disclosure.

Pullman & Comley LLC

by Jessica Grossarth Kennedy

November 17, 2021

SEC's FY 2021 Enforcement was Robust in the Muni Arena.

The Securities and Exchange Commission's enforcement results for fiscal year 2021 highlight the SEC's focus on disclosure in the municipal finance space.

The results, released late Thursday, show the Commission overall filed 7% more enforcement actions in 2021 than in 2020. It also awarded over $564 million to more than 100 whistleblowers, surpassing $1 billion over the life of the SEC whistleblower program.

Twelve of the 697 SEC enforcement actions this year were categorized under public finance abuse. That represented 2% of the total enforcement actions and is consistent with the 12 public finance abuse actions taken in the previous fiscal year.

Overall, of the total filed enforcement actions, 434 were new, 120 were against issuers for delinquent filings, and 143 were for follow-on administrative proceedings.

The SEC also obtained judgments for close to $2.4 billion in disgorgement, a more than 30% decrease from FY 2020. It also won over $1.4 billion in penalties, which represented a 33% increase over the previous fiscal year.

"As these results show, we go after misconduct wherever we find it in the financial system, holding individuals and companies accountable, without fear or favor, across the $100-plus trillion capital markets we oversee,? SEC Chair Gary Gensler said in a statement.

While total actions in 2021 decreased by 3% from 2020, the SEC said the new actions "spanned the entire securities waterfront," and addressed what the Commission described as "traditional and emerging areas."

For example, the SEC brought a number of first-of-their kind enforcement actions involving for

example, so-called DeFi technology, the dark web, and regulation crowdfunding.

In the public finance abuse category, the SEC brought its first enforcement actions of Municipal Securities Rulemaking Board Rule G-42 regarding duties of municipal advisors, when it alleged that Choice Advisors LLC and two of its principals, Matthias, O'Meara, and Paula Permenter violated their fiduciary duties.

The agency found that O'Meara and Permenter entered into a prohibited fee-splitting arrangement with their former employer without disclosing either the arrangement or their relationship with the underwriting firm, to their clients.

The SEC further alleged that Choice, O'Meara, and Permenter unlawfully engaged in municipal advisory activities when they were not registered with the SEC or the MSRB.

Permenter agreed to settle with the SEC without admitting or denying any findings.

Beyond Rule G-42, the SEC brought several other public finance abuse enforcement actions in 2021.

For example, the Commission charged RBC Capital Markets and two individuals with unfair dealing in municipal bond offerings. According to the SEC, RBC allegedly improperly allocated bonds for institutional customers and dealers, who then resold or "flipped" the bonds to other broker-dealers at a profit. RBC agreed to pay more than $800,000 to resolve the charges without admitting or denying the SEC's findings.

The SEC also charged a broker dealer and its former chief executive officer with failing to disclose a conflict of interest regarding a tender offer of municipal bonds and a school district and its former chief financial officer for allegedly misleading investors who purchased $28 million in municipal bonds.

Speaking at a National Association of Bond Lawyers workshop in October, Natalie Garner, senior counsel in the SEC's public finance abuse unit, described issuer disclosure as "a major [enforcement] priority" and said that the SEC will make every effort to hold responsible "issuers who have engaged in fraud or who mislead investors."

Garner also said that the enforcement actions taken in recent years highlight the importance of disclosure requirements.

Lily Becker, partner at Orrick, with an extensive background in government investigations and enforcement actions, echoed that notion. "I think we can expect a continued focus on both annual and periodic disclosures." Becker said.

Becker explained that "because the SEC looks at both omissions and misstatements, entities should be thinking carefully about both including all material information and making sure information disclosed is accurate at the time of the disclosure."

Securities lawyer Michael Botelho, partner with the Hartford, CT-based law firm of Updike, Kelly & Spellacy, acknowledged that enforcement activity in the municipal arena was fairly robust this past year.

"The SEC brought some high profile actions against municipal issuers and their key officials for inaccurate and incomplete disclosure and for misleading investors in their offering documents," Botelho pointed out.

“Under the leadership of Chairman Gensler, I expect that the SEC will remain active in bringing new investigations and enforcement actions in this area and possibly exceed last year’s output,” Botelho said.

BY SOURCEMEDIA | 11/19/21

By Kelley R. Taylor

Hotel Builder Misled Municipal Bond Investors, Trustee Alleges.

- **Hard Rock Hotel developer lied about construction loan: UMB**
- **Bonds defaulted when wholesale lender failed to fund loan**

The developer of a planned Hard Rock Hotel in a suburb of Kansas City, Kansas, allegedly defrauded investors who bought about $23 million municipal bonds issued to help finance the project, according to a lawsuit filed in federal court.

Minnesota developer D. Jon Monson said that he had a $52 million construction loan in place when he sold the bonds, but hadn’t closed on that financing, which was only for $48.8 million, UMB Bank NA said in a Nov. 1 lawsuit filed in U.S. District Court in Kansas City. UMB is the trustee for the securities.

Monson was relying on a wholesale lender that in turn relied on third-party lines of credit to fund that loan, UMB said. The warehouse lender wasn’t able to fund the project, meaning the project couldn’t be completed and leaving no revenue to make required payments for the bonds, UMB said.

The developer also failed to contribute $3 million of the down payment deposit before the bonds were issued and “had no intention” of contributing $4.2 million for predevelopment costs and a $1.5 million equity payment, UMB alleged.

Monson didn’t immediately return a call seeking comment.

The developer won approval from the city of Edwardsville in 2018 to build the 241-room hotel and conference center near the Kansas Speedway, a NASCAR racetrack. Edwardsville issued tax-free debt in 2019 backed by the 4,500-person city’s hotel tax and incremental increases in property taxes generated by the project.

The case is UMB Bank, NA v. D. Jon Monson; Compass Commodities Group III, LLC; 11 Water LLC, One10 Hotel HRKC LLC’ and One10 Hotel Holding LL, 21-cv-2504, U.S. District Court, District of Kansas.

Bloomberg Markets

By Martin Z Braun

November 9, 2021, 1:43 PM PST

SEC Appoints New Director of Office of Credit Ratings: Cadwalader

The SEC named Ahmed Abonamah as its new Director of the Office of Credit Ratings. Mr. Abonamah had served as the Acting Director of the Office of Credit Ratings since October 2020.

Since joining the SEC in 2016, Mr. Abonamah has served in multiple roles within the SEC's Office of Municipal Securities, including as Deputy Director.

Cadwalader Wickersham & Taft LLP

November 9 2021

GASB Outlook E-Newsletter Fall 2021.

Read the GASB Newsletter.

MSRB Seeks Volunteers For Its FY 2022 Compliance Advisory Group.

The MSRB seeks volunteers for its FY 2022 Compliance Advisory Group! Associated persons of regulated entities serving in compliance, legal, trading, and operations; and public officials and employees of municipal entities are encouraged to volunteer.

Read more.

MSRB Reviews Initiatives under Strategic Plan: Cadwalader

At its quarterly Board of Directors meeting, the MSRB reviewed initiatives under the strategic plan for the municipal securities market (see previous coverage here).

The MSRB considered updates on:

- outreach to ensure municipal securities advisor principals are qualified with the Series 54 exam by November 30, 2021;
- the MSRB request for public comment on amendments to MSRB Rule G-27 ("Supervision");
- implementation of new MSRB Form G-32 for filing primary market data;
- the Electronic Municipal Market Access website's redesign; and
- environmental, social and governance considerations in the municipal market.

Cadwalader Wickersham & Taft LLP

October 29 2021

The Libor Transition: Protecting Consumers and Investors - SIFMA Statement

SUMMARY

SIFMA Statement for the Record submitted to the U.S. Senate Committee on Banking, Housing, and Urban Affairs on the November 2, 2021 Hearing titled: The Libor Transition: Protecting Consumers and Investors.

View the SIFMA Statement.

SIFMA Joint Letter to Senate Re Transition from LIBOR to Alternative Reference Rates.

SUMMARY

SIFMA in a joint letter with with other associations, provided comments to the United States Senate Committee on Banking, Housing, and Urban Affairs in support of federal legislation to address "tough legacy" contracts that currently reference LIBOR.

View the SIFMA Letter.

SIFMA signed with the following:

Structured Finance Association
Institute of International Bankers
Consumer Bankers Association
Bank Policy Institute
Commercial Real Estate Finance Council (CREFC)
U.S. Chamber of Commerce, Center for Capital Markets Competitiveness
Mortgage Bankers Association
Government Finance Officers Association
The Loan Syndications and Trading Association (LSTA)
The International Swaps and Derivatives Association (ISDA)
Student Loan Servicing Alliance
Housing Policy Council
The Financial Services Forum
Investment Company Institute
The Loan Syndications and Trading Association (LSTA)
The Real Estate Roundtable
American Bankers Association
The American Council of Life Insurers (ACLI)
National Association of Corporate Treasurers

MSRB Proposes Extension of Remote Inspection Relief: Cadwalader

The MSRB proposed to extend temporary relief for municipal securities dealers to conduct internal inspections remotely for calendar year 2022 until June 30, 2022. The MSRB stated that this

extension is appropriate, given ongoing operational challenges due to the COVID-19 pandemic.

The proposed rule change to Supplementary Material .01 of MSRB Rule G-27 ("Supervision") would condition a dealer's election to conduct a remote inspection on:

- the dealer amending its written supervisory policies as appropriate;
- the dealer's use of remote inspections as part of an effective larger supervisory system; and
- maintenance of records related to remote inspections.

The MSRB filed the proposed rule change with the SEC for immediate effectiveness.

Cadwalader Wickersham & Taft LLP

October 27 2021

MSRB Holds First Quarterly Board Meeting of New Fiscal Year.

The municipal market's self-regulatory organization held its first quarterly Board of Directors meeting of Fiscal Year 2022 in Washington, DC, on October 27-28, 2021. The Municipal Securities Rulemaking Board (MSRB) discussed initiatives to advance the four goals outlined in its long-term strategic plan.

"Building on years of groundwork and investment in our people, our technology and our understanding of our diverse stakeholders' needs, the MSRB is poised to have one of the most productive and impactful years in our history," said MSRB Chair Patrick Brett. "This year, we are making meaningful strides to modernize municipal market regulation, provide transparency through technology, fuel innovation through data, and uphold the public trust."

Market Regulation

November is the final month of a 24-month grace period for municipal advisor principals to pass the MSRB's Series 54 professional qualification examination. The Board discussed the importance of continued outreach to municipal advisor firms to remind them of available resources and their obligation to ensure that any individual functioning in the capacity of a municipal advisor principal is properly qualified with the Series 54 exam by the compliance deadline of November 30.

The Board also received an update on regulatory initiatives underway, including the ongoing review of the library of interpretive guidance in the MSRB rule book to identify pieces of guidance that should be clarified, amended or retired to facilitate compliance.

"As part of our commitment to prudent and practical regulation, we are focused on a retrospective review not just of the rules themselves but the over 200 pieces of associated guidance," said MSRB Vice Chair Meredith Hathorn. "We will continue to make incremental but impactful progress toward reducing unnecessary compliance burdens on regulated entities and ensuring our rule book aligns with current market practices."

The Board also received an update on regulatory initiatives authorized by the Board at previous meetings, including requesting public comment on potential amendments to modernize MSRB Rule G-27 on dealer supervision.

The Board discussed potential next steps to ease challenges raised by dealers related to the implementation of new MSRB Form G-32 for filing primary market data.

Market Transparency

The Board received an update on a six-month effort to reimagine the user experience and user interface of Electronic Municipal Market Access (EMMA®) website through collecting extensive input from a variety of stakeholders and producing future-state EMMA product design and functionality wireframes. This redesign will provide users with enhanced functionality and improve data quality and customization capabilities. While the complete overhaul of EMMA is a multi-year project, this most recent stakeholder input is already informing the creation of a roadmap for near-term enhancements, such as an improved feature to make it easier for issuers to ensure their disclosure filings are associated with all the necessary individual securities within the EMMA system.

“After years of behind the scenes work, we’re ready to start rolling out powerful new cloud-based tools on EMMA that will take the transparency of our market to a new level, and transform EMMA into a more dynamic and effective tool for informed decision-making,” Brett said.

Market Structure and Data

The Board discussed its data strategy and received a demonstration of a new master data management platform that will enhance the MSRB’s data governance and oversight capabilities. The Board also received an update on potential research topics to add to the MSRB’s growing library of market data analyses that shed light on trends and developments in market structure.

“Our strategic plan lays out an important focus on providing high quality market data that enables greater understanding of the market and empowers innovators to create data tools and services that serve the information needs of all market participants,” Brett said. “We are tremendously excited to invite our stakeholders to collaborate with us in test-driving data tools in our forthcoming EMMA Labs innovation hub.”

Public Trust

The Board discussed several topics that benefit from ongoing stakeholder engagement, including seeking information from the public about Environmental, Social and Governance (ESG) considerations in the municipal market; efforts to advance diversity, equity and inclusion in public finance; and a comprehensive review of the MSRB’s fee model as described in the Fiscal Year 2022 Budget.

“The Board appreciates hearing from market stakeholders, especially on an evolving market trend such as ESG that lends itself to many different perspectives,” Brett said. “We look forward to providing a forum for all interested stakeholders to share information and viewpoints on ESG considerations for the municipal market through our forthcoming public request for information.”

Date: October 29, 2021

Contact: Leah Szarek, Chief External Relations Officer
202-838-1300
lszarek@msrb.org

MSRB Announces Topics for Quarterly Board Meeting.

October 2021 Board of Directors Meeting Discussion Items

The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) will meet October 27-28, 2021, in Washington, DC, for its first meeting of FY 2022, where it will discuss initiatives to advance the four goals outlined in its long-term strategic plan:

Market Regulation
The Board will receive an update on initiatives underway to modernize the rule book, including forthcoming requests for comment on draft MSRB Rule G-46 for solicitor municipal advisors and potential amendments to harmonize MSRB Rule G-27 on dealer supervision. Also in progress are regulatory filings to seek approval from the Securities and Exchange Commission (SEC) to modernize the text of MSRB Rule G-34 on obtaining CUSIP numbers and amend MSRB rules in light of SEC Regulation Best Interest.

The Board will receive an update on the implementation of new MSRB Form G-32 for filing primary market disclosures, as well as the Series 54 examination for municipal advisor principals.

Market Transparency
The Board continues its oversight of efforts to leverage cloud technology to modernize the MSRB's critical market transparency systems, including the Electronic Municipal Market Access (EMMA®) website. The Board will receive an update on how input from stakeholders is advancing efforts to redesign the EMMA user interface and user experience.

Market Structure and Data
The Board will discuss its data strategy and receive a demonstration of a new master data management platform that will enhance the MSRB's data governance and oversight capabilities. The Board also will discuss potential future research publications and initiatives to enhance understanding of trends and developments in market structure.

Public Trust
The Board will discuss several topics that benefit from ongoing stakeholder engagement, including seeking information from the public about Environmental, Social and Governance (ESG) considerations in the municipal market; efforts to advance diversity, equity and inclusion in public finance; and a comprehensive review of the MSRB's fee model as described in the Fiscal Year 2022 Budget.

October GFOA Government Finance Review Available Now.

This month's GFR is now available to read electronically. Among the topics in the October edition is an in-depth look into interruptions at work with ideas to tame distractions to maximize workplace productivity.

READ ONLINE

GASB Changes Name of Report to "Annual Comprehensive Financial Report"

Norwalk, CT, October 19, 2021 — The Governmental Accounting Standards Board (GASB) today issued a pronouncement that changes the name of the most extensive report prepared following its standards to the annual comprehensive financial report or ACFR. Until now, the name applied to those reports was the comprehensive annual financial report.

The name change was prompted by GASB stakeholders raising concerns that the acronym of the prior name of the report sounds like a profoundly offensive term when spoken. The changes in the name and acronym were widely supported by individuals and stakeholder groups that responded to the April 2021 Exposure Draft proposing the changes.

Statement No. 98, *The Annual Comprehensive Financial Report*, establishes the annual comprehensive financial report and ACFR in generally accepted accounting principles (GAAP) for state and local governments and eliminates the prior name and acronym. Otherwise, no changes were made to the report's structure or content.

Regarding the issuance of Statement 98, GASB Chair Joel Black said, "Once this issue came to our attention, it was clear that working with our stakeholders to rename this important document was simply the right thing to do. Thank you to everyone who worked with us and shared their input."

Financial reports prepared following GAAP are required to contain basic financial statements (including notes to financial statements) and required supplementary information (such as management's discussion and analysis). Governments may voluntarily present those required components in an ACFR, which also contains more background and explanatory information from management, additional financial statements disaggregating certain columns in the basic financial statements, and a "statistical section" of 10-year trends in financial, economic, demographic, and operating information.

The requirements of Statement 98 are effective for fiscal years ending after December 15, 2021. Earlier application is encouraged.

The ABCs of ESG: Practical Considerations for Environmental, Social and Governance Disclosure in Municipal Finance.

In order to make an informed investment decision as to the purchase of municipal bonds, the latest trend is for investors to evaluate environmental, social and governance ("ESG") factors relative to the bond issuers in question, state and local governments.[1] In making this determination, investors primarily look to the information provided by the issuers in the offering document or official statement for the issuance of the bonds. As a result, in preparing their offering documents, issuers must now weigh the applicability, significance and scope of ESG factors with respect to their financial condition, operations and overall investor mix. In this blog, we will discuss ESG disclosure practices, review the benefits and risks of including such disclosure and contrast general ESG considerations with specific green bond issuances.

Currently, neither the Securities and Exchange Commission nor the Municipal Securities Rulemaking Board ("MSRB") has weighed in with regulatory guidance as to ESG disclosure in the municipal marketplace. Some industry participants have argued for a uniform set of criteria or a

checklist for ESG disclosure, as a means of promoting clarity and consistency. However, questions remain as to whether a "one size fits all" approach would be feasible for issuers and meaningful to investors, given the diversity of issuers and credits in the municipal space. Others have advocated for a principles-based approach, with general guidelines that issuers can apply and adapt to their particular facts and circumstances. The Government Finance Officers Association ("GFOA") has taken the lead role in this regard, releasing best practices for ESG disclosures.

Generally, the GFOA's ESG best practices focus on two main principles: (1) identifying and, if possible, quantifying the material ESG risks or factors affecting the issuer of the municipal bonds, specifically as they affect the issuer's operations and financial position, including its credit quality and ability to repay the bonds, as well as its infrastructure and ongoing projects (including projects to be funded with the bond proceeds) and (2) the policy actions to be taken by the issuer to address those risks/factors. In that regard, the environmental component of ESG is intended to address matters such as climate change and resiliency, energy efficiency and renewable energy. The social component focuses on diversity and inclusion, equity and social justice issues affecting the long-term sustainability of a community, such as income disparities, housing affordability, access to quality healthcare and public education and internet access and affordability. The governance component touches on the particular government's organizational structures, decision-making processes, budgetary practices, transparency, risk mitigation (cybersecurity), legal framework for the issuance of debt, financial reporting requirements and pension and OPEB liabilities. In that respect, it is likely that issuers are already addressing most of the topics under the governance component in their offering documents. Nevertheless, the current focus on ESG factors represents an opportunity for issuers to consider this information in a new light.

As a practical matter, the majority of projects financed with the proceeds of municipal bonds are likely to already fall within at least one of the three ESG categories. Nevertheless, ESG disclosure is intended to go beyond the specific projects, providing investors with a broader window into the issuer's overall operations and creditworthiness, with an emphasis on these factors.

It is worth noting that, under two key antifraud provisions of the federal securities laws, Section 17 (a) of the Securities Act of 1933 and Rule 10b-5 of the Securities Exchange Act of 1934, issuers must avoid making misstatements or omissions of material facts (with respect to ESG matters or otherwise) to investors in connection with the issuance and sale of municipal bonds to the public. Therefore, without a clear pricing differential or market advantage to offset this corresponding regulatory scrutiny, issuers may be understandably weary of including any new ESG disclosure in their offering documents. Additionally, to comply with MSRB Rule 15c2-12, underwriters involved in certain offerings of municipal bonds must confirm that the issuer will provide investors (through a filing with the MSRB) with annual updates to the financial information and operating data included in the offering document. Issuers should carefully consider whether any new ESG disclosure included in the offering document would be picked up by this annual reporting requirement.

Like ESG disclosure, issuances of bonds with particular labels such as "green," "climate," "social" or "sustainable," where the proceeds are used to finance related projects, have increased in popularity during the past decade. Although the concepts have certain similarities, providing broad ESG disclosure about an issuer in an offering document does not necessarily transform the bond issue into green, climate, social or sustainable bonds. Likewise, providing specific project-related details in connection with an issuance of green, climate, social or sustainable bonds may capture some, but not necessarily all, of the ESG disclosure principles outlined above relative to the issuer. Stated differently, notwithstanding the potential for overlap, ESG disclosure focuses on the status of the issuer overall, whereas a labeled bond issue focuses on the use of the bond proceeds to finance a particular project or set of projects. Green bond disclosure guidance is currently under development

by both the National Federation of Municipal Analysts and the GFOA in any event.

It appears that investor interest in ESG considerations will be with us for the foreseeable future. Issuers should work with their bond counsel, disclosure counsel, financial advisors and underwriters to develop a sensible approach to address this trend.

[1] For conduit issuers, attention should be paid to the issuer and the borrower when evaluating ESG factors.

Adler Pollock & Sheehan P.C.

October 29, 2021

SEC Charges School District and the District's Former Chief Financial Officer with Violations of Securities Laws in a 2018 Bond Offering.

On September 16, 2021, the Securities and Exchange Commission ("SEC") entered an order against a school district (Sweetwater Union High School District (the "District") in San Diego County, California) and charged the school district's former chief financial officer ("CFO") with misleading investors who purchased $28 million of the District's 2018 bonds (the "Bonds").

In its actions, the SEC noted that the District and its former CFO presented stale and misleading financial information in connection with the offering of the Bonds. Specifically, the District included misleading FY2018 budget projections in its offering document for the Bonds, which budget did not reflect salary increases approved prior to the start of FY2018. When the District's financial standing was being reviewed and then disclosed in the bond offering document, the District projected that its operations would result in a general fund balance of around $19.5 million when in reality, its operations resulted in a negative $7.2 million general fund balance; the District did not disclose that this projection was inconsistent with known actual expenses at that time. The former CFO's department generated reports that showed expenses trending higher than its budget projected, to which the SEC said the District "continued to ignore reports showing that its budget for the 2018 Fiscal Year was untenable." The District continued to use the stale budget projections in its reporting to the finance team1, the rating agency and eventually bond purchasers. Further, the former CFO attested to the accuracy of the information in the offering document when she signed the offering document, the bond purchase agreement and a certification to the underwriter.

The charges were brought under the Securities Act of 1933 Section 17(a)(2) and (3) for the District and 17(a)(3) for the former CFO; violations of these provisions do not require intentional wrongdoing on the part of the actor and can be established on the basis of negligence. Section 17(a)(2) and (3) provide, in relevant part, as follows:

> It shall be unlawful for any person in the offer of sale of any securities … directly or indirectly – …
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would

operate as a fraud or deceit upon the purchaser.

"A statement or omission is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision."2

The SEC order against the District found that the District violated Section 17(a)(2) and (3) by "making misleading statements and omissions to investors, as well as to the bonds' credit rating agency and other municipal industry professionals on the transaction." The District was ordered to cease and desist violating Section 17(a)(2) and (3), implement various written policies and procedures, conduct staff training, retain an independent consultant to review the policies and procedures, implement recommendations of the independent consultant, disclose this settlement in future bond offerings, and provide certifications of compliance to the Staff of the SEC regarding these settlement conditions.

The SEC charged the former CFO with violating section 17(a)(3). The former CFO has agreed to settle with the SEC, including being enjoined from participating in any future municipal securities offerings and paying a $28,000 penalty. The settlement is pending court approval.

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1 The finance team consisted of the underwriter and its counsel, bond counsel, disclosure counsel and the District's municipal advisor.
2 Securities Act of 1933 Release No. 10981, September 16, 2021, citing Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988).

Dorsey & Whitney LLP

by Jennifer Block, John Danos, David Grossklaus, Cristina Kuhn, James Smith

October 27, 2021

GFOA: Meaningful Disclosure Encouraged in ESG by State and Local Governments

GFOA's Executive Board approved several new best practices on the Social and Governance factors of ESG and Disclosure as well as a comprehensive best practice on voluntary disclosure. Similar to action taken in 2019 to establish the Disclosure Industry Workgroup, the GFOA has taken a leadership role in our market to develop a pragmatic approach to encouraging meaningful disclosure in the area of ESG by state and local governments.

Publication date: October 2021

DOWNLOAD FULL RELEASE

GFOA Best Practices in ESG Disclosure: Social

Social

It is important for issuers to consider the social factors that are challenging their community and decide if any have a connection to repayment of their bonds or could negatively impact operations or financial position over the term of its debt.

DOWNLOAD BEST PRACTICE

GFOA Best Practices in ESG Disclosure: Environmental

Environmental

The increase in the number of extreme weather events in recent years has raised public awareness about climate change. Investors and rating analysts are not just looking to see if risks are present, but also want information regarding what plans a government has to address these risks.

DOWNLOAD BEST PRACTICE

GFOA Best Practices in ESG Disclosure: Governance

Governance

Governance factors have always been a part of government management, operations, and finances. Governance includes governmental decision-making, policies, legal requirements, organizational structure, and financial and budget management practices.

DOWNLOAD BEST PRACTICE

MSRB Requests Comment on Draft Compliance Resources for Supervisors: Cadwalader

The MSRB requested comment on draft compliance resources to assist regulated entities in their supervision over new issue pricing of municipal securities. The MSRB stated that "the goal of the compliance resources is to enhance understanding regarding the existing regulatory standards applicable to regulated entities' supervision of conduct when pricing a new issuance of municipal securities."

One proposed compliance resource would focus on underwriting activity under MSRB Rule G-17 ("Conduct of Municipal Securities and Municipal Advisory Activities") and supervisory obligations under MSRB Rule G-27 ("Supervision"). The second resource would focus on duty of care obligations under MSRB Rule G-42 ("Duties of Non-Solicitor Municipal Advisors") and non-solicitor municipal advisors' duties under MSRB Rule G-44 ("Supervisory and Compliance Obligations of Municipal Advisors").

Both proposed resources would summarize the relevant rule requirements, provide responses to FAQs and offer "Questions for Consideration" to help entities design their compliance procedures.

The MSRB specifically requested comment on the following issues, among others:

- the relevance of the questions posed and the usefulness of the responses given in the FAQs;
- the format of the resources;
- the language of the draft compliance resources in conveying the "flexibility" afforded to entities in tailoring their supervisory systems; and
- whether the MSRB should amend the abovementioned rules or adopt formal interpretive guidance expressly to define new issue pricing obligations.

Comments on the compliance resources must be submitted by January 4, 2022.

Cadwalader Wickersham & Taft LLP

October 6 2021

Banks Press Ahead with Term SOFR Preparation; Credit Sensitive Rates Under Scrutiny: McGuireWoods

Where we left off: In our Mid-Year Check-In blogpost, we noted that progress in the development and readiness of some credit sensitive interest rate indices (e.g., Bloomberg's BSBY, IBA's Bank Yield Index and American Financial Exchange's AMERIBOR) seemed to spark some urgency in the development of SOFR's forward-looking term rate in Q2, including the ARRC's selection of CME Group as administrator for Term SOFR, and the CFTC's SOFR First Initiative to encourage primary market swaps dealers to quote USD swaps at SOFR. Those efforts culminated in the ARRC's formal recommendation of Term SOFR for use in the bank loan market on July 29, 2021.

The LSTA followed up by releasing a Concept Credit Agreement for Day-One Term SOFR, and now many bank clients have developed day-one Term SOFR language in their own form documents in anticipation of issuing new loans at Term SOFR in Q4.

SOFR Deals Debuting. Both Daily Simple SOFR and Term SOFR have started to see actual use cases in the market in Q3:

- Some term sheets in the market include provisions to toggle over to day one Daily Simple SOFR or Term SOFR if they close after a certain date (e.g., December 31, 2021 or in some cases earlier).
- Two of Ford Motor Company's credit facilities led by JP Morgan Chase Bank, N.A. transitioned to daily simple SOFR on September 29,[1] providing the market with a look at how that variety of SOFR operationalizes in real time.
- Several sources (Covenant Review; Bloomberg; LSTA) reported seeing the first Term SOFR term sheet, a loan for the acquisition of Sanderson Farm.
- Bloomberg and the LSTA have noted a JPMorgan Chase Bank, N.A. led deal for Walker & Dunlop with a TLB priced at SOFR.

One issue to watch in the development of day one SOFR deals: whether the rate is constructed as a three part calculation (SOFR + spread adjustment (used to approximate LIBOR) + applicable margin) or a two part calculation (SOFR + applicable margin, loading any implied spread to LIBOR into the applicable margin). The spread adjustments fixed by the ARRC at the end of Q1 used the average delta between SORF and LIBOR over the prior 5 years – the LIBOR spread over SOFR is now much lower in our current environment of historically low interest rates. As a result, lenders have been watching to see whether the spread adjustment becomes a hotly negotiated point in a three part

construct, or subsumed into the negotiation of the applicable margin in a two part construct. Banks may need to operationalize a dual tracking system if both approaches remain in the market.

Do you have a license for that? LIBOR became so ubiquitous in the bank loan market that its status as a licensed product faded into the background, but LIBOR is a rate administered and licensed for use by the ICE Benchmark Administration (IBA), and financial institutions using LIBOR are required to enter into a license agreement with the IBA for its use. CME Group is licensing its publication of Term SOFR on largely the same basis, and market participants are now familiarizing themselves with CME Group's license categories and use restrictions in anticipation of booking loans at Term SOFR in Q4. A summary of CME Group's license tiers can be found at cmegroup.com. At a high level, it seems clear that an administrative agent running a syndicated lending transaction needs a license, as does each member of the syndicate using the published Term SOFR rates to make its own interest calculations; the "end-user" borrower would not, unless the borrower is independently using the CME Group's published rates to run its own models and analytics. The takeaway: if you plan to use Term SOFR as an agent or to run your own models, you'll need one; if you're unsure, check in with CME Group.

What about those Credit Sensitive Rates? The rapid progress of Term SOFR over the summer hasn't stopped loan market participants from preparing to offer credit sensitive rates as an alternative, and in both their systems and loan document forms, despite the comments of SEC Chair Gary Gensler at the June 2021 FSOC Meeting.

The official sector, however, continues to preach caution on the robustness of credit sensitive alternatives:

- The International Organization of Securities Commissions ("IOSCO"), which previously established Principles on Financial Benchmarks for evaluating LIBOR alternatives, on September 8 issued a statement specifically calling for greater attention to its Principle 6 (relative size of the underlying market in relation to the volume of trading) and Principle 7 (data sufficiency in a benchmark's design to accurately and reliably represent the underlying market) in evaluating credit sensitive rates.
- SEC Chair Gensler led off the Fifth SOFR Symposium on September 20 by restating and amplifying his FSOC meeting concerns about the thin (or in times of economic stress, likely non-existent) market in unsecured term bank-to-bank lending underlying BSBY and other credit sensitive rates.
- In comments at a Structured Finance Association conference in Las Vegas on October 5, Vice-Chair of the Federal Reserve Randal Quarles again focused on the need for banks to move quickly away from new LIBOR loans by the end of 2021, and emphasized that regulators will be paying close attention.

Many banks have established October or November internal deadlines for "no new LIBOR" to provide cushion for the very clear regulatory December 31 cutoff, so we expect to see rapid progress in market adoption of, and adaptation to, both SOFR-based and credit sensitive rates throughout Q4. We'll be watching and advising on how it evolves for our financial institution clients.

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[1] https://www.sec.gov/Archives/edgar/data/37996/000003799621000079/exhibit101toseptember29202.htm; https://www.sec.gov/Archives/edgar/data/37996/000003799621000079/exhibit102tosep

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By Donald A. Ensing & Susan Rodriguez on October 12, 2021

LIBOR Transition Blog

McGuireWoods

GFOA Priorities Face Uncertainty as Infrastructure Vote Delayed.

After a tense week of negotiations on Capitol Hill that included a rare visit from the President and visible interparty disagreement, Speaker Nancy Pelosi was forced to delay the highly anticipated vote on the bi-partisan Infrastructure Investment & Jobs Act (IIJA). Lawmakers had originally been told the vote would be held no later than September 27, but fears over missing that deadline were realized when the vote was pushed to the September 30. Once it became clear that opposition to the bill was steadfast among progressive Democrats, Speaker Pelosi had no choice but to punt the vote further into the calendar, which places a cloud of uncertainty over the GFOA muni bond provisions that currently sit in the House version of a budget reconciliation bill. **GFOA member outreach on issues like restoring advance refunding and increasing the small borrower/bank qualified limit will be critical in the coming weeks.**

Driving much of the disarray is a sharp difference between moderate and progressive Democrats who disagree on the topline spending figures of President Biden's legislative priorities. Earlier in the year, progressive Democrats in the House made clear that support for the Senate-passed IIJA was contingent on a commitment to the budget reconciliation bill that satisfied their legislative goals. But moderate members of the Senate, chiefly Senators Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ), have balked at the lofty $3.5 trillion price tag of the budget bill, leading to the twenty-four-hour negotiation crunch that played out during the final days of September.

As a result, on October 4, Speaker Pelosi set a new deadline of October 31 to vote on the infrastructure bill. Congressional Democrats will have the rest of the month to bridge the sizeable gaps both within their party and across the aisle with the hope of moving forward on both packages.

GFOA's Federal Liaison Center (FLC) created an overview page on the muni bond priorities to help members as they reach out to their respective congressional delegation. Click here for a brief summary and additional resources on the priorities.

GFOA's FLC will continue to monitor this legislative activity.

SEC Approves Changes to MSRB Customer Disclosure Rules.

Per BDA advocacy – the SEC approves changes to MSRB customer disclosure rules.

For more information please click here.

BOND DEALERS OF AMERICA

OCTOBER 6, 2021

UBS's Botched Muni Statements Cost Clients Millions, Suit Says.

- **Bank error allegedly inflated muni investors' taxable income**
- **Suit says UBS won't issue corrected statements to all clients**

UBS Financial Services cost clients "at least tens of millions of dollars" by incorrectly reporting tax information to holders of taxable municipal bonds, a lawsuit alleges.

The bank, which oversees more than $90 billion of municipal bonds, didn't report amortizable bond premium on forms clients use to prepare tax returns, resulting in "substantial" overstatement of taxable income and overpayment of taxes, according to a proposed class action suit filed on Tuesday in New Jersey federal court.

U.S. Treasury rules allow investors who buy a taxable bond for more than its face value to amortize the premium over the remaining life of the bond to reduce taxable income. But UBS reported only the gross amount of interest on clients' federal 1099 forms, the suit alleges.

UBS spokeswoman Alison Keunen said the bank disputes the allegations in the suit and intends to vigorously defend itself. The Swiss bank has more than 1 million clients.

Richard M. Goodman brought the suit on behalf of customers who bought taxable municipal bonds in accounts maintained by UBS on or after January 1, 2014. Goodman said in the suit that his own UBS financial adviser, Brian Edgar, notified the bank's municipal bond and tax departments in 2016 that it was incorrectly reporting the amortizable bond premium.

Over-Reported Income

Edgar was able to get UBS to issue amended 1099 forms to his clients. Goodman said he received corrected tax documents, showing the bank overstated his taxable income from 2015 through 2018 by more than $100,000. Other clients of Edgar's had their taxable income over-reported by tens or hundreds of thousands of dollars, the suit claims.

According to Goodman, UBS declined to address this issue for all of its clients. He said he was told UBS would issue corrected statements if a client or their financial adviser raised the issue.

"Defendant purposely continued its incorrect and harmful practices, and failed to promptly and fully correct its prior erroneous tax information reporting upon learning of the error," Goodman said.

In addition to federal income tax overpayments, hundreds of UBS clients nationwide were harmed because they received smaller tax refunds than they were entitled to and incurred unnecessary expenses for tax preparers and advice, the complaint said. The lawsuit alleges negligence and breach of contract, among other claims.

'Firm-Wide Deficiencies'

UBS has previously drawn regulatory action for inaccurately reporting the tax status of municipal bond interest payments. It was fined $750,000 in 2015 and $2 million in 2019 by the Financial Industry Regulatory Authority for misstating that interest paid to thousands of customers on their municipal bond holdings was tax-exempt. UBS was required to pay restitution to customers for any increased tax liabilities.

Interest payments from bonds issued by state, city and local governments are generally free from

federal income taxes and income taxes in the state where the bonds was issued, with some exceptions. However, municipalities have issued taxable bonds for purposes like financing sports facilities, funding industrial development, improving public pension funding levels or refunding previously refinanced municipal bonds. Universities issue taxable munis for projects or purposes that don't qualify for tax-exempt financing.

More than $620 billion of taxable muni bonds without corporate security identifiers are outstanding, accounting for 16% of the $4 trillion market, according to data compiled by Bloomberg.

The case is Richard Goodman, Individually And As Trustee of the Richard M. Goodman Revocable Living Trust, And on Behalf Of All Others Similarly Situated vs. UBS Financial Services Inc., 21-c--18123, U.S. District Court, District of New Jersey

Bloomberg Markets

By Martin Z Braun

October 7, 2021, 7:35 AM PDT

— With assistance by Natalia Lenkiewicz

UBS Sued Over Muni-Bond Snafu that Cost Clients.

UBS Financial Services misreported interest paid on taxable munis, resulting in higher tax bills for clients, according to a lawsuit.

UBS Financial Services Inc. is facing a new lawsuit that claims the firm's problems with tax reporting on municipal bonds overstated clients' taxable income, costing clients higher tax bills and creating potential damages.

Beginning with the 2014 tax year, UBS "incorrectly reported certain tax information to its clients relating to interest paid on taxable municipal bonds," according to the complaint, which was filed Tuesday in U.S. district court in New Jersey.

The plaintiff, Richard Goodman, resides in Michigan, and UBS allegedly admitted it had overstated his taxable income by $100,000 for 2015 to 2018, according to the complaint, which is seeking class action status.

Overstating a client's income results in "substantial" overpayments of federal income taxes, according to the complaint.

Goodman's financial adviser at UBS in Michigan was Brian Edgar, according to the complaint. He left UBS last year and now works at Wells Fargo Advisors in Florida, according to his BrokerCheck report.

Improper reporting of interest paid on taxable municipal bonds is violation of Treasury regulations and UBS' own policies, according to the complaint.

UBS "failed to report amortizable bond premium for taxable municipal bonds as required by applicable Treasury regulations," according to the complaint. The firm's "incorrect tax information reporting to clients had the effect of substantially overstating the clients' taxable income costing

money" to Goodman and other clients.

According to the complaint, the overall size of the municipal bond market is in the range of $3.8 trillion to $4 trillion.

"UBS disputes the allegations in the complaint and intends to vigorously defend against the lawsuit," said a UBS spokesperson on Friday morning.

Edgar did not return a call at Wells Fargo Advisors to comment.

The complaint sites two Finra actions against UBS involving municipal bonds, from 2015 and 2019. Most recently, the Financial Industry Regulatory Authority Inc. censured and fined UBS Financial Services $2 million for "repeated failures" in addressing municipal short positions in a timely way and for inaccurately representing the tax status of thousands of interest payments to customers.

Interest payments from municipal bonds are generally subject to federal income taxes if the bond proceeds are used for a purpose that substantially benefits private interests, and such bonds are called taxable municipal bonds, according to the complaint.

The interest payments from such bonds are often free from state and local income taxes in the state or locality where the bond was issued, with some exceptions.

investmentnews.com

By Bruce Kelly Bruce Kelly

October 8, 2021

UBS Faces Lawsuit Over Alleged Muni Misreporting.

UBS allegedly misreported tax information on taxable municipal bonds, costing its clients millions of dollars, according to news reports.

The company allegedly failed to report amortizable bond premiums on forms used by clients to prepare their taxes, which led to "substantial" overstatement of taxable income and subsequently cost clients "at least tens of millions of dollars," Bloomberg writes, citing a proposed class action lawsuit filed by Richard Goodman on behalf of himself and other customers who bought taxable municipal bonds in accounts maintained by UBS on or after Jan. 1, 2014.

The suit claims that Goodman's own financial advisor, Brian Edgar, told the firm's municipal bond and tax departments in 2016 about the errors in reporting the amortizable bond premium, according to the news service.

Edgard got UBS to amend 1099 forms for his clients, at which point Goodman learned that UBS had overstated his taxable income from 2015 through 2018 by more than $100,000, Bloomberg writes. The suit claims that Edgar's other clients' taxable income was overstated by tens or hundreds of thousands of dollars, according to the news service.

Moreover, Goodman claims in the suit that he learned that UBS would not amend the errors automatically but would only do so if a client or their advisor brought it up, Bloomberg writes.

“Defendant purposely continued its incorrect and harmful practices, and failed to promptly and fully correct its prior erroneous tax information reporting upon learning of the error,” Goodman said, according to the news service.

UBS spokeswoman Alison Keunen tells Bloomberg that the firm disputes the allegations and plans to vigorously defend itself.

Earlier this week, Merrlll Lynch agreed to pay $1.5 million to settle claims brought by the Financial Industry Regulatory Authority alleging violations related to short sales in municipal securities, as reported.

financialadvisoriq.com

October 8, 2021

FINRA Proposes Fee for New Municipal Advisor Principal Exam.

FINRA proposed establishing new fees for the new Municipal Advisor Principal Examination (a/k/a the Series 54 exam). Under the proposed amendment to Section 4(c) of Schedule A to its By-Laws, FINRA would establish a $115 fee to account for examination administration and delivery expenses.

Comments on the proposal must be submitted within 21 days of its publication in the Federal Register.

Cadwalader Wickersham & Taft LLP

September 27 2021

SLFRF Recipients: Treasury Extends Reporting Deadline

The U.S. Department of Treasury has extended the reporting deadline for the Project & Expenditures Report for all recipients of the Coronavirus State and Local Fiscal Recovery Fund (SLFRF).

- **States, Metropolitan Cities, Counties, Territories, and Tribal Governments will now report on January 31, 2022**, instead of October 31, 2021.
- The first reporting deadline for **Non-Entitlement Units (NEUs) will be April 30, 2022**, instead of October 31, 2021.
- States have been sent a draft letter regarding the change by the Treasury which can be used to notify their NEUs.

Additional updates to existing guidance as well as a user guide to assist recipients with the reporting portal will be released at a later date.

GFOA’s Federal Liaison Center will continue monitoring for updates.

ESG Issues on the 'Mind' of the Muni Market's Regulator.

- **MSRB's Kim says regulator is looking at rise of ESG in munis**
- **New strategic plan includes promoting diversity in industry**

The head of the $4 trillion municipal securities market's regulator said the explosion of environmental and socially minded investing is an area it's watching closely.

Mark Kim, chief executive officer of the Municipal Securities Rulemaking Board, said in an interview that the board is focused on the quickly growing environmental, social, and governance sector of the market.

And he said it's possible that the U.S. Securities and Exchange Commission could start looking at it as well after its chairman, Gary Gensler, said this month that he's asked his staff to look into ways to bring transparency to asset classes like municipals.

"ESG is going to be one of the issues that will be on our mind and will be on the mind of the SEC as well when it comes to the municipal securities market," said Kim, who took his post last year. He said the MSRB is interested in the issue from the point of view of disclosure.

ESG was one of the areas mentioned in the MSRB's strategic plan it's releasing Monday, which will guide its activity for fiscal 2022 through 2025. The plan outlines goals, such as modernizing its rulebook and using data to strengthen market fairness.

ESG investing has grown in popularity in the muni market as it has in other asset classes. Sales of green muni bonds remain strong, with more than $10 billion sold in 2021, and some investment firms have debuted funds focused on sustainable investments. But municipal issuers still aren't disclosing enough information around risks, such as those related to the environment, according to a July report by Principles for Responsible Investment, a United Nations-backed group that promotes sustainable investing.

The MSRB's strategic plan says the regulator will "coordinate with regulatory and industry efforts, promote dialog and use MSRB data to inform the market's understanding of environmental, social and governance (ESG) factors and emerging issues." Kim said the MSRB plans to issue a request for information before the end of the year to get feedback from members of the industry on the topic.

Diversity Goal

The MSRB's strategic plan also says the regulator has a commitment to "diversity, equity and inclusion" and mentioned the importance of seeking diverse perspectives when coming up with its rules.

Kim said that starts with the MSRB's governance, and said he's proud that women make up two-thirds of its new board starting in October. It's partnering with the Financial Industry Regulatory Authority on an initiative to better understand the challenges facing minority- and women-owned businesses in the industry and if there are any "undue" burdens that MSRB rules place on them, he said.

"This is a really important question — it's one that we're going to engage on directly with market participants, and we're also partnering with our fellow regulators to address this issue more systemically across the entire financial services industry," Kim said.

Bloomberg Markets

By Amanda Albright

September 20, 2021, 9:00 AM MDT

GASB Fact Sheet on the Proposed Note Disclosure Concepts Statement.

View the GASB Fact Sheet.

[09/23/21]

US Bond Lobbies Warn SEC of Severe Disruption Under Rule Change.

Lobbying groups warn that activity in the world's largest bond market could stop at the end of this month without last-minute exemption from the vague US 50-year-old rule that previously aimed only at equities. doing.

Bond industry groups have told regulators that the revised rules will have a "significant and detrimental effect" on the government and corporate bond markets, calling for more time for explicit grace or compliance. The amendment was first proposed last year, but market participants assumed that until the last few months, the rules would only relate to the stock market.

"We believe that the application of such rules is widespread and unnecessary," writes the American fixed income dealers, securities industry and financial markets associations.

The SEC's 1971 statute, known as "Rule 15c2-11," "Publishing or submitting" Of the price for buying and selling securities away from the exchange. Market participants primarily believe that this is an attempt to protect retail investors from predatory plans and fraudulent activity in Penny shares.

This rule requires broker-dealers such as JPMorgan Chase and Citi to review a wide range of information about publishers, including quarterly and annual reports. Last year, the SEC, led by Jay Clayton, fine-tuned the rules for the first time in almost 30 years and included requirements for disclosure of information.

"Improvements to Rule 15c2-11, which focuses on these individual investors, have been delayed for a long time," said Clayton at the time, and technological advances allow investors to be more up-t--date before trading. I added that I can do it.

The law has not explicitly excluded bonds, but in reality it has never been applied to bonds for a lifetime of 50 years. This has long been suitable for markets where many corporate issuers are not listed on the stock market and do not regularly produce regular earnings reports. It is unclear what disclosure will be required for government bonds, such as government bonds issued by the US Treasury.

However, BDA Vice President of Policy and Research Michael Decker said the SEC, led by new chief Gary Gensler, will also affect government and corporate bonds under the amendments outlined last year. He said he confirmed. Only municipal bonds have an explicit exemption.

“It’s been a few days here and little work has been done. It’s pretty clear to me that the SEC didn’t really think about this,” Decker said.

The SEC declined to comment.

Bankers, trading platforms and investors are facing stringent compliance requirements ahead of unexpected end-of-month deadlines, and growing awareness of new requirements is disrupting bond markets.

Without guidance and amendments from the SEC, broker-dealers will withdraw for fear of attracting enforcement action from securities regulators, and some bond market transactions will stop when the rules come into force at the end of this month. I am concerned about that.

The SEC’s move has come a time of increased regulatory scrutiny of fixed income transactions, and Gensler said this month it intends to bring greater efficiency and transparency to the market.

Broker-dealers are struggling to understand how to collect, verify, and publish information about companies that trade bonds. They also question what counts as a bond quote is published or submitted, a term that is not defined in the rules.

Bond trading is increasingly shifting to electronic venue trading, with prices being streamed to the screen. To avoid market disclosure, some market participants may return the transaction to the phone until clearer guidance is available.

“The risk is that if a broker-dealer feels out of compliance based on the interpretation of an internal team, he may be forced to stop quoting certain bonds to avoid non-compliance,” Kevin said. • McPartland states. Head of Research, Market Structure and Technology at Greenwich Associates.

California News Times

SEC Sues Muni Advisers in First Case Over Bank Fee Splitting.

- **Advisers failed to disclose deal to charter school clients**
- **Regulator charged Choice Advisors and two principals**

A firm that advises charter schools on bond issues was sued by the Securities and Exchange Commission for allegedly making an undisclosed fee-splitting agreement with an underwriter, in what the agency said was its first case of enforcing code-of-conduct rules ushered in after the 2008 financial crisis.

Choice Advisors LLC and its two principals, Matthias O’Meara and Paula Permenter, failed to disclose to their clients the conflicts of interest associated with “the illicit arrangement or their relationship” with an investment bank where they previously worked, the SEC said in a statement. Fee-splitting arrangements are prohibited in any bond deal where the municipal adviser provides advice to clients of the underwriter.

O’Meara and Permenter started the Texas- and Colorado-based Choice in 2018 to advise clients on bond sales. The two were employed by BB&T Securities LLC until that year, according to financial registration records. BB&T, which merged with SunTrust Bank in 2019 to form Truist Financial, wasn’t charged by the SEC.

The SEC also alleged that O'Meara, while still employed at the investment bank, simultaneously served as a banker and as an adviser for two clients, a conflict that is at odds with an adviser's fiduciary duty. O'Meara allegedly took steps to increase the overall fees paid by the clients to enrich himself and Choice, costing one school about $40,000 in additional fees, according to the SEC.

Conflicting Interests

"Schools and other municipal entities should be able to trust that municipal advisers are serving their clients' interests and not their own," LeeAnn Gaunt, chief of the SEC Enforcement Division's Public Finance Abuse unit, said in a statement.

Such financial advisory firms act on behalf of governments and nonprofits that are raising money in the bond market, seeking to ensure the clients get the best possible borrowing costs. That can put them in opposition to underwriters, which have an incentive to set the yields on bonds high enough so that they can easily be sold. The advisory business was subject to regulations under the Dodd-Frank law after states and governments were hammered by losses on risky bond deals that went haywire during the credit crash.

The SEC said that Choice and its principals also failed to register with the agency or Municipal Securities Rulemaking Board, as required under the law.

Permenter agreed to settle with the SEC without admitting or denying the allegations. She was censured and ordered to pay a $26,000 penalty.

O'Meara and Choice, who didn't settle, were charged with violating the municipal adviser fiduciary duty, deceptive practices, fair dealing and registration provisions of the federal securities law. Paul Maco, an attorney at Bracewell who is representing O'Meara and Choice, didn't immediately respond to a request for comment. Kyle Tarrance, a spokesperson for Truist, declined to comment.

Bloomberg Markets

By Martin Z Braun

September 23, 2021, 1:14 PM MDT Updated on September 23, 2021, 2:10 PM MDT

SEC Files Muni Bond Action Centered on Flippers.

Municipal bonds are an important area in which few cases are typically filed. Frequently, when a case is filed it focuses on the financial information included in an offering which is at times not updated as required. Another key area, however, involves "flippers," that is, those who improperly obtain bonds in an offering not for an investment but to sell to others. Offering procedures for municipal bonds typically prioritize investors over flippers. Yet there are increasing numbers of cases where the offering procedures are thwarted. This week the Commission brought another case based on flippers.

In the Matter of Kenneth G. Bredrich, Adm. Proc. File No. 3-20569 (September 17, 2021) is an action which named as a respondent the registered representative. He was employed at Major Broker. The internal procedures of Major Broker required that municipal bond sales be prioritized to allocate bonds per a standard methodology that prioritized customers and dealers over flipper absent different instructions from issuers. Over a four-year period beginning in 2014, however, the firm in a

number of instances failed to follow the procedures. Indeed, at times Major Broker used the flippers to circumvent issuer priorities. As a result, the Order alleges violations of Exchange Act Section 15B (c)(1). To resolve the proceedings, Respondent consented to the entry of a cease-and-desist order based on the Section cited in the Order and to a censure. In addition, Respondent shall not act in the securities business or negotiate the purchase and sale of municipal bonds for a period of six months. He will also pay a penalty of $30,000. S*ee also In the Matter of Jaime I. Durando,* Adm. Proc. File No. 93044 (September 17, 2021)(Respondent is also employed by Major Broker and engaged in essentially the same conduct as above; resolved with a cease-and-order based on the same Section and the payment of a $25,000 civil penalty).

September 23 2021

SEC Actions

MSRB Outlines Strategic Plan for Next Four Years: Cadwalader

The MSRB released its fiscal year 2022-2025 strategic plan for improving and protecting the municipal securities market.

The MSRB's goals include:

- updating the MSRB's rulebook in a "prudent and practical" manner to encourage capital formation and support a fair and efficient market;
- leveraging technology to improve the Electronic Municipal Market Access (EMMA®) system;
- producing useful, high quality market data; and
- prioritizing the MSRB's "commitment to social responsibility, diversity, equity and inclusion."

The MSRB stated that its new fiscal year will begin on October 1, 2021. The Board intends to publish an annual budget with further information on "near-term organizational priorities" in line with its strategic plan.

Cadwalader Wickersham & Taft LLP

September 20 2021

MSRB Strategic Plan Advances Mission to Protect and Strengthen the Municipal Securities Market, Giving America the Confidence to Invest in Its Communities.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) has published its new strategic plan for the next four years. The strategic plan advances the MSRB's mission to protect and strengthen the municipal bond market, enabling access to capital, economic growth, and societal progress in tens of thousands of communities across the country.

"Our vision is to give America the confidence to invest in its communities," said Mark Kim, CEO of the MSRB. "As we eventually emerge from the pandemic, communities will drive economic growth and recovery by investing in public infrastructure, the majority of which will be financed through the

$4 trillion municipal securities market that we are entrusted to regulate."

Under the leadership of the Board of Directors, the MSRB developed the strategic plan in close collaboration with stakeholders. The plan lays out four strategic goals for Fiscal Years 2022-2025:

Market Regulation: Modernize the rule book through a prudent and practical approach that promotes a fair and efficient market and facilitates capital formation

Market Transparency: Leverage investments in the cloud and in our people to enhance the value of EMMA ® as a platform that benefits all market participants and the public

Market Data: Provide high quality market data that enable comprehensive analysis and insight of the municipal securities market

Public Trust: Uphold the public interest and the integrity of the municipal market across all of the MSRB's strategic goals and initiatives, including a commitment to social responsibility, diversity, equity and inclusion

"We've established three guiding principles to define how we will go about advancing this multi-year strategic plan," Kim said. "First, we will continue to adhere to our Congressional mandate. Second, we will engage with our diverse stakeholders by facilitating dialogue and serving as a forum for discussion of evolving market topics. Third, we will ensure accountability to the public through greater transparency and inclusivity as we make progress on and advance these strategic goals."

The MSRB begins its new fiscal year on October 1, 2021 and will publish the annual budget with additional detail on near-term organizational priorities aligned with the long-term plan.

Date: September 20, 2021

Contact: Leah Szarek, Chief External Relations Officer
202-838-1300
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SEC, MSRB and FINRA to Offer Compliance Outreach Program: Cadwalader

The SEC, the MSRB and FINRA will be offering a 2021 Compliance Outreach Program for municipal advisors. The program is scheduled for October 7, 2021. The program is intended to facilitate a dialogue between municipal advisers, municipal market participants and the agencies regarding regulatory issues. The program will include topics on (i) conflicts of interest disclosures, (ii) new issue pricing, (iii) examination preparation and (iv) agency observations and enforcement actions. In addition, there will be a presentation regarding use of the EDGAR system.

FINRA is administering registration for the program, which is free and open to the public

September 20 2021

Cadwalader Wickersham & Taft LLP

Intriguing FINRA Enforcement Action In the Bond Market: More to Come? - Arent Fox

In June, FINRA reminded broker-dealers of their best execution obligations which are derived from common law agency principles and fiduciary obligations. The best execution obligation is incorporated in applicable MSRB rules and, through judicial and Securities and Exchange Commission (SEC) decisions, in the anti-fraud provisions of the Federal securities laws.

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In 2021, the Financial Industry Regulatory Authority (FINRA) enforced the "best judgment" requirement for publishing prices related to municipal securities. In the same action, FINRA found that the broker-dealer violated MSRB rules related to fair dealing and supervision.

In addition, in June, FINRA reminded broker-dealers of their best execution obligations which are derived from common law agency principles and fiduciary obligations. The best execution obligation is incorporated in applicable MSRB rules and, through judicial and Securities and Exchange Commission (SEC) decisions, in the anti-fraud provisions of the Federal securities laws.

These actions may signal that FINRA is preparing to bring additional enforcement actions relating to the best judgment and best execution rules. [1]

In fact, on September 14, 2021, the SEC Chairman testified before the Senate Banking, Housing, and Urban Affairs Committee, where he stated (the "Senate Banking Gensler Testimony"):

> The U.S. capital markets represents 38 percent of the globe's capital markets. [In addition to examining the Treasury market], I've asked staff for recommendations on how we can bring greater efficiency and transparency to the non-Treasury fixed income markets – corporate bonds, a $11 trillion market; municipal bonds, a $4 trillion market; and [mortgage and] asset-backed securities (which back mortgages, automobiles, and credit cards), a $13 trillion market.This market is so critical to issuers. It is nearly 2.5 times larger than the commercial bank lending of about $10.5 trillion in our economy.

Relevant Governmental Regulators

FINRA

FINRA is a self-regulatory organization working under the supervision of the SEC. As the largest dispute resolution forum in the securities industry, FINRA resolves securities-related disputes. It also educates investors, and enacts and enforces rules governing the ethical activities of all registered brokers and registered broker-dealers in the United States.

As a self-regulatory organization, the FINRA Board is comprised of both regulated industry representatives and public representatives.

According to FINRA Rule 2010, registered broker-dealers and registered brokers are required to:

> [o]bserve high standards of commercial honor and just and equitable principles of trade

FINRA primarily issues rules with respect to the corporate securities market. This market's size was $10.6 trillion, with new issuance volume of $2.3 trillion in 2020.

MSRB

Like FINRA, the MSRB is a self-regulatory organization under the oversight of the SEC. In forming the MSRB, the Senate Committee on Banking, Housing, and Urban Affairs expressed hope in 1977, " that a self-regulatory body like the MSRB would develop prophylactic rules for the industry, which would preemptively deter unethical and fraudulent practices". [2]

Its mission, as set forth on the MSRB's web page, is to protect investors, state and local governmental issuers, other municipal-related entities (including conduit borrowers) and the public interest.

The MSRB was created in the 1970's, when New York City was on the brink of default, to prevent fraudulent and manipulative acts and practices of some broker-dealers. Over the ensuing decades, there were other crises impacting the municipal industry including (i) the $2.3 billion default of bonds issued by the Washington Public Power System Supply ("WPPSS"; commonly referred to in the bond industry as 'Whoops') in 1983 caused by increased costs and delays in nuclear power plant construction, and related inadequate disclosure to investors, (ii) the bankruptcy of Orange County, California in 1994 precipitated by its overreliance on risky investments, including derivatives, which were also not adequately disclosed [3] and (iii) the bankruptcy of Jefferson County, Alabama due to the increased expense of rebuilding its sewer system necessitated by U.S. Environmental Protection Administration violations, and its overreliance on costly interest rate swaps for the variable rate bonds it issued to finance the sewer system improvements.

In 2020, the municipal securities market's size was $3.9 trillion, with new issuance volume of $494 billion. According to Moody's Investors Service, Inc., the default rate average from 2010-2019 was 0.10% for municipal securities compared to a default rate of 2.25% for corporate securities.

Rulemaking

Historically, MSRB Rules were "principles-based" with specific guidance given where appropriate. MSRB is in the process of updating its rules and related guidance.

MSRB Rules generally fall into the following categories:

professional qualification

- fair practice rules to protect investors, municipal entities, conduit borrowers and the general public – *best execution, suitability, material investor and conflicts of interests disclosures; transparent pricing; pay-to-play; municipal advisor obligations*
- uniform practice – *standard confirmation, underwriting and settlement procedures*
- market transparency – *primary offerings; real-time reporting of trade prices*
- regulated entity administration – c*ompliance; proper recordkeeping; supervision of professionals*

According to the MSRB, these rules require regulated entities to:

> observe the highest professional standards in their activities and relationships with customers and municipal entities, and go significantly beyond the general anti-fraud principles of the federal securities laws

Lack of Enforcement Powers

Notwithstanding the foregoing rulemaking authority, responsibility for inspection and enforcement of MSRB Rules rests with the following Federal government and self-regulatory bodies:

- FINRA
  securities firms
- SEC
  municipal advisors, and all securities firms and banks
- Federal Deposit Insurance Corporation (FDIC)
- Board of Governors of the Federal Reserve System
- Office of the Comptroller of the Currency (OCC)
  regulated banks

Recent Board Developments

MSRB's Board has both representatives from regulated entities that it is required to regulate and public representatives. Recently, there have been structural changes implemented at the Board level. See "Notable Recent Observations – Governance/Compliance Developments – MSRB" below.

Best Judgment Standard
Municipal Securities

General

MSRB Rule G-13 requires that dealers, brokers or their authorized agents use their "best judgment" when quoting prices related to municipal securities.

Indicators that a price quotation is in the broker/dealer's "best judgment" include a price quotation's reasonable relationship to the fair market value of the securities at the time the quotation is made. According to an April 1988 MSRB interpretation of Rule G-13, relevant factors for municipal security price quotations include a dealer's (i) current overall and security-specific inventory position, and (ii) anticipation of the market price for the securities. Finally, a broker or dealer would be acting outside of its best judgment if it is not prepared to buy or sell the securities at the price published.

Violations

Responding to concerns about the meaning of "best judgment" and its practical application, the MSRB provided the following three examples of how to operationalize the best judgment rule (the " MSRB 1977 interpretation letter") :

Bid Restrictions – Bonds Subject to Redemption
In the first example, a dealer who knowingly submits a bid for general market bonds that have been called by the issuer, at a price more appropriate for bonds not subject to redemption, is acting "unethically." Such actions would run afoul of the "free and open" nature of municipal securities markets. In that same example, should a dealer on the other side of a trade accept the bid, this dealer arguably is acting outside of its best judgment because it is presumed to be aware of the bonds' called status. Although such a transaction between professionals would be insufficient to sustain a fraud charge, the acceptance of the trade would not relieve the bid-making dealer from a MSRB Rule G-13 enforcement action.

Bond Valuation Mismatches
A dealer who submits a bid for bonds based on valuations from independent sources that mistake the

nature of the proffered securities is the second example of an action outside of the best judgment rule. Under these circumstances, if the dealer knew that the valuation was mistaken, its bidding would also violate this rule [4].

Lack of Any Dealer Diligence
Finally, a dealer who makes a bid or an offer on a security, having no knowledge of the value of the security or of comparable securities, is the third example of a situation where MSRB would likely recommend that an enforcement action be brought against a broker or dealer. MSRB specifically stated that a price quotation that is "pulled out of the air" is not based on the dealer's best judgment and is against the promotion of free and open markets in municipal securities.

Corporate Securities

Best Execution

Pursuant to FINRA Rule 5310, a broker-dealer or broker is required to use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions.

Parallel provisions are contained in MSRB Rule G-18.

Fair Quotations

Generally, under FINRA Rule 5220 and MSRB Rule G-13(b), no broker-dealer may make an offer to buy or sell a security at a stated price unless a bona fide price and the broker-dealer is prepared to purchase or sell at such price and at such conditions stated at the time of such offer.

Suitability
A broker-dealer must have a reasonable basis to believe that a recommended transaction or investment strategy is suitable for a customer, both from a municipal and a corporate perspective. This is to be based upon the reasonable diligence of the broker-dealer including, but not limited to, investment objectives, and experience, liquidity needs, and risk tolerance.

Fair Dealing Requirement
Municipal Securities

General

Under MSRB Rule G-17, which regulates conduct of municipal securities and municipal advisory activities, each broker, dealer and municipal advisor has a duty to deal fairly with all persons. This rule prohibits any deceptive, dishonest or unfair practices.

MSRB Rule G-17 contains for applying the rule in various contexts. These notices include guidance on use of the rule as a remedy for actions such as: (i) delaying delivery of securities to customers (October 13, 1983); (ii) conduct of syndicate managers (on selling short, December 21, 1984); (iii) altering settlement issue dates (February 26, 1985); (iv) charging excessive fees (July 29, 1985); (v) disclosure obligations of prepayment of principal (March 19, 1991); (vi) disclosure of material facts (on original issue discount bonds, January 5, 2005); (vii) bond issue ratings (January 22, 2008); and (viii) protection of municipal entities (August 2, 2012).

The rule provides that customers or other parties harmed by violations of MSRB Rule G-17 may seek recovery through MSRB's arbitration program or through litigation.

Recent Effectiveness of Fair Dealing Interpretive Notice

General

Importantly, the aforementioned interpretive notice relating to the protection of municipal entities was amended on November 6, 2019, with an effective date of November 30, 2020. It was subsequently amended on February 16, 2021, with an extended effective date of March 31, 2021 (the "2021 Fair Dealing Interpretive Notice"). It noted that the prior interpretative notice, dated August 2, 2012, and related interpretations (collectively, the "2012 MSRB G-17 Interpretative Notic e") will only apply to prior underwriting relationships.

The 2021 Fair Dealing Interpretive Notice states that MSRB Rule G-17 does not merely prohibit deceptive conduct on the part of the registered broker-dealer and broker, but also establishes a general duty to deal fairly with all persons including, but not limited to issuers, *even in the absence of fraud*.

Lack of Fiduciary Duty

However, a broker-dealer does not have a fiduciary duty to the issuer under Federal securities laws and, therefore, is not required to act in the best interests of the issuer without regard to its own financial or other interests. Consequently, the broker-dealer may not discourage issuers from retaining a municipal advisor or otherwise imply that hiring a municipal advisor is redundant as the municipal advisor, unlike the broker-dealer, does have a fiduciary duty to the issuer. [5]

Required Transaction-Specific Disclosures

A broker-dealer is required to deliver transaction-specific disclosures where it has recommended a financing structure or product to an issuer. Such disclosures are to be specific rather than general in nature and, among other things, be based upon the type of structure or product recommended, as well as the issuer's knowledge and experience regarding such structure or product.

Additional Complex Municipal Securities Requirements

In the 2021 MSRB G-17 Interpretive Notice complex municipal securities, financing requires even more particularized transaction-specific disclosures than do routine financing structures or products. Complex municipal securities financings include, but are not limited to, variable rate demand obligations (VRDOs), financings involving interest rate swaps and financings in which interest rates are benchmarked to an index (e.g. LIBOR, SIFMA or SOFR). The fact that a structure or a product has become relatively common in the market does not reduce its complexity.

Specifically, the broker-dealer must disclose the related material characteristics and material financial risks of this type of complex municipal securities structure or product to the issuer. By way of example, for an interest rate swap, such disclosures include: (i) the material characteristics such as material economic terms, material operational issues, and material rights and obligations of the parties, and (ii) the material financial risks such as market, credit, operational and liquidity risks.

Such disclosures should be sufficient to allow the issuer to assess the magnitude of its potential exposure, and that there may be accounting, legal and other associated risks. The 2021 Fair Dealing Interpretive Notice also notes that such a registered entity may also be subject to Commodity Futures Trading Commission (CFTC) and SEC rules.

In addition, any incentives the broker-dealer receives in recommending a complex municipal securities financing must be disclosed.

Conduit Borrower Obligation

Notably, the 2021 Fair Dealing Interpretive Notice does not set out the broker-dealer's duties to other parties to a municipal securities financing such as conduit borrowers, but notes that MSRB Rule G-17 requires that an underwriter deal fairly with all persons involved in the financing.

Corporate Securities

General

To supplement FINRA Rule 2010, FINRA has a general rule that a registered broker-dealer or broker cannot effect any transaction in, or induce the purchase or sale of, any security by any manipulative, deceptive or other fraudulent device or contrivance.

Additional Complex Corporate Securities Requirements

As with municipal securities, FINRA has additional requirements for complex securities such as interest rate swaps. However, these requirements are tied into a registered entity's suitability obligations under FINRA Rule 2111.

Supervision

Municipal Securities

MSRB Rule G-27, focusing on supervision, creates an obligation on the part of brokers and dealers to supervise certain activities in order to ensure compliance with MSRB Rules and the Securities Act of 1933, as amended, and to establish a system of supervision of the municipal securities activity of each dealer and certain related employees. The supervisory procedures must be in writing, contain instructions for regular internal inspections of activities – with the goal of detecting and preventing violations of the applicable rules – and include instructions for the review of incoming and outgoing correspondence of its municipal securities representatives.

Finally, each dealer is required to designate a principal to establish, maintain and enforce supervisory control policies and procedures that comport with the municipal securities activities of the dealer, in addition to the specific procedures required in para. (f) of the rule. MSRB Rule G-27's interpretations address questions regarding who may be designated with supervisory responsibilities (branch office managers, municipal securities principals and sales principals) and procedures for review of correspondence with the public. Additional clarifications are laid out in interpretive letters.

Corporate Securities

Generally, the registered broker-dealer or broker must (i) designate chief compliance officers and (ii) have in place processes to establish, maintain and review policies and procedures reasonably designed to achieve compliance with applicable FINRA Rules and Federal securities laws and regulations.

The broker-dealer's supervisory system must provide, among other things: (i) written procedures, (ii) designation of an appropriately registered principal with authority to carry out the supervisory responsibility for (a) each type of business requiring registration and (b) each supervisory jurisdiction/branch office, (iii) assignment of each registered person to an appropriately registered representative or principal who is to be responsible for supervision of said person's activities, (iv) internal inspections and (v) importantly, a review and investigation of transactions that are reasonably determined to violate the Securities Exchange Act of 1934, as amended, or FINRA Rules prohibiting manipulative and deceptive devices.

Notable Recent Observations

Governance/Compliance Developments

MSRB

At the end of December 2019, *The Bond Buyer* reported that many of its senior officials left the MSRB during 2019 including its Chief Executive Officer, Chief Regulatory Officer and General Counsel. Starting in Fall 2020, these officers were replaced. One of the examination priorities of the SEC's Division of Examinations is the effectiveness of MSRB's policies, procedures and controls.

In Fiscal Year 2021, the MSRB implemented certain structural changes to its Board including, among other things (i) tightening the independence standard of public representatives on the Board by requiring a minimum of five (5) years (versus two (2) years) of separation from a regulated entity; (ii) splitting its Nominating and Governance Committee into two (2) separate committees – one focusing on Board nominations and the other focusing on Board governance; (iii) requiring that the chair of its Nominating, Governance and Audit Committees be public representatives and not regulated entity representatives from the Board, and (iv) the re-establishment of two advisory groups – the Compliance Advisory Group and the Municipal Fund Securities Advisory Group.

At its recent quarterly board meeting, the MSRB (i) selected a new Chair, (ii) announced that the Chief Risk Officer will assume the Chief Financial Officer role from the Chief Operating Officer who had a dual role, presumably leaving a vacancy in the Chief Risk Officer role, and (iii) stated it will soon announce the names of four (4) new board members to start on October 1, 2021. The new MSRB board members were announced on August 4, 2021.

Broker-Dealers

It should be noted that some of the largest banks have recently replaced their Chairs, Chief Executive Officers, Chief Compliance Officers and Chief Risk Officers. [6]

SEC

As part of the 2021 Examination Priorities, the Division of Examination also highlighted (i) the importance of internal compliance programs and Chief Compliance Officers at regulated entities, (ii) broker-dealer rules, in both the corporate and municipal bond markets, relating to best execution, pricing and mark-ups, (iii) Reg BI compliance and whether registered investment advisors have fulfilled their fiduciary duties of care and loyalty to their clients, and (iv) in the municipal securities area, whether municipal advisors have met their fiduciary duty obligations to municipal entity clients, including the disclosing of and managing of conflicts of interest and documentation of the scope of their client engagements.

FINRA Arbitration Requirements

FINRA recently reminded its member firms about requirements when using pre-dispute arbitration agreements for customer accounts. In particular, it noted that FINRA Rules do not allow class action claims in arbitration, specifically restricting members' actions preventing customers from bringing or participating in judicial class actions by adding class action waivers in these pre-dispute arbitration agreements.

As FINRA is by far the largest dispute forum for the U.S. securities industry, this is an important protection for investors.

Regulation Best Interest (Reg BI)

Corporate Securities

Adopted by the SEC in 2019, the Regulation Best Interest rule set a new standard of conduct for broker-dealers and their associates that go beyond the existing suitability obligations in FINRA Rule 2111. Reg BI requires that broker-dealers and their associates act in the best interest of a retail customer when making recommendations for any securities transaction or an investment strategy involving securities. Reg BI is not applicable to commercial customers.

Incorporating the care and conflict of interest obligations, and other key principles in the fiduciary duties of care and loyalty under Section 206(1) and (2) of the Investment Advisers Act of 1940, as amended, the goal of Reg BI is to align the broker-dealer standard of conduct with the reasonable expectations of retail customers. Two main indicators that a broker-dealer is acting in the best interest of its retail customers are: (i) making recommendations that do not prioritize the interest of the broker-dealer or its firm ahead of the interests of the retail customer; and (ii) establishing, maintaining and enforcing policies and procedures aimed at facilitating full and fair disclosure of any conflicts of interests.

The rule notes that disclosure is insufficient to meet the standard of conduct established by Reg BI.

Municipal Securities

In March, the MSRB indicated that the Reg BI principles would soon apply to bank dealers whose retail investment products and offerings include municipal securities. This is important as over two-thirds of municipal securities are held by individual investors either directly or through mutual funds.

Rules Equally Applicable to Corporate Bond Market

Although the instant case related to bidding on municipal securities, parallel rules apply to the corporate bond market as highlighted above.

To Enforce or Not to Enforce

Enforce

Enforcement of the rules set forth in this *Client Alert*, and other existing rules by the SEC, FINRA and the MSRB, is critical for the proper functioning of both the municipal and corporate bond markets. This will ensure the fair, transparent and efficient operations of these essential financial markets.

Not to Enforce

On the other hand, as quoted in the previously mentioned Bond Buyer article with respect to FINRA's enforcement action of the best judgment standard that is the first legal topic of this Client Alert, a representative of Bond Dealers of America [7] stated that:

> *One of our concerns is that this case could establish compliance standards for the market more broadly. We don't have any problems with compliance standards, but enforcement cases are not the way to establish compliance standards.*

Answer to the Question

We leave it to the reader to decide which is the best path to assure compliance with the applicable

MSRB and FINRA Rules, and related supervision standards, in the municipal bond and corporate securities markets.

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[1] During the publication of this writing, our prediction rang true. In late August, the SEC fined a firm and its former CEO for failing to disclose conflict of interest.

[2] See MSRB Interpretation of February 24, 1977 of MSRB Rule G-13 MSRB 1977 Interpretation Letter, citing the Senate Report 94-75, 94th Cong., 1st Sess., 42-32.

[3] This bankruptcy caused a significant delay of the lead author's simultaneous pricing of life care facility bonds issued by Orange County, New York.

[4] Although not addressed in the MSRB 1977 Interpretation Letter, it is our belief that the best judgment rule would also be violated, if based upon reasonable diligence, the dealer should have known that the valuations were erroneous.

[5] The fair dealing rule, MSRB Rule G-17, relates to both solicitor municipal advisors (those who solicit on behalf of third-parties such as broker-dealers) and non-solicitor municipal advisors. In addition, a new draft rule highlights that solicitor municipal advisors, as compared to non-solicitor municipal advisors, do not have a fiduciary duty to municipal entities and conduit borrowers but are required to (i) have a reasonable basis for their representations, (ii) refrain from making misrepresentations that they know or should know are inaccurate or misleading, (iii) disclose material facts about (a) its role, compensation and conflicts of interest, and (b) the broker-dealer or other third-party that the solicitor municipal advisor represents including, but not limited to, such party's disciplinary history. See MSRB Notice 2021-07 dated March 17, 2021, with a comment deadline of June 17, 2021, relating to draft MSRB 'Rule G-46 – Duties of Solicitor Municipal Advisor s.' Comments to draft MSRB Rule G-46 were received from the following associations: (i) National Association of Municipal Advisors (NAMA), (ii) Securities Industry and Financial Markets Association (SIFMA), the leading trade association for broker-dealers, investment banks and asset managers operating in the US and global capital markets according to its website, and (iii) Third Party Marketers Association (3PM). NAMA recommends that MSRB require solicitor municipal advisors to disclose to the municipal entities they are soliciting, as well as conduit borrowers, that they do not have a fiduciary duty to them. SIFMA, among other things, suggests that a clear statement be made in the draft rule that 'solicitor municipal advisors do not owe a fiduciary duty to their clients and solicited entities.' In addition, SIFMA questions why representations made by a solicitor municipal advisor 'must be truthful and accurate' as it believes it is inconsistent with what non-solicitor municipal advisors must comply with.
Among 3PM's comments, it suggests that MSRB should not apply draft Rule G-46 to conduit borrowers, or provide guidance to solicitor municipal advisors that are also municipal advisor third-party solicitors working on behalf of third-party investment advisors.

[6] Since 2020, the following senior managers had resigned: Citigroup (Chief Executive Officer, Chief Compliance Officer and Chief Risk Officer), Credit Suisse (Chair, Chief Compliance Officer and Chief Risk Officer), Deutsche Bank (Chief Compliance Officer and Chief Risk Officer), Goldman Sachs (Chief Compliance Officer), HSBC (Chair, Chief Compliance Officer and Chief Risk Officer), Lloyds Bank (Chair), and Wells Fargo (Chief Compliance Officer and Chief Risk Officer). In addition, there were significant senior leadership changes announced at Bank of America in August/September 2021 including: (i) departures of Vice Chairman, Chief Operating Officer, and Head of Fixed Income, Currencies and Commodities Sales/CEO of BofA Securities Europe SA/Country Executive for France, with no replacements yet determined, (ii) departure of Global

General Counsel with a replacement announced, (iii) internal position changes of Chief Financial Officer, Chief Administrative Officer, President of Global Commercial Bank and Business Banking, and President of Retail Banking, (iv) the split of the Chief Operations and Technology Officer role into two roles – Chief Technology and Information Officer, and Chief Operations Executive, and (v) new positions created for Global Compliance and Operational Risk, and Global Real Estate and Business Continuity.
Also in 2021 (i) JPMorgan Chase & Co. (a) announced the resignation of the Co-President and Chief Operating Officer, and (b) included as new members to its Operating Committee: the Global Head of Securities Services, Executive Chair of Investment Banking & Corporate Banking, and Head of Global Markets, and (ii) Mizuho Financial Group announced changes in senior management for the Group, Mizuho Bank and Mizuho Securities.

[7] According to Bond Dealers of America, it is the only trade association exclusively focused on U.S. fixed income markets and represents bond dealers headquartered in cities across the country.

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by Kirsten Hart, Patrice Howard, Ph.D., Les Jacobowitz

September 22, 2021

Arent Fox

SEC Charges School District with Misleading Bond Investors.

The Securities and Exchange Commission (SEC) has charged a San Diego County-based school district and its former chief financial officer with misleading investors who purchased $28 million in municipal bonds.

The SEC's complaint alleges Sweetwater Union High School District and the school district's former CFO, Karen Michel, gave investors misleading budget projections indicating the school district would be able to cover its costs and end the fiscal year with a general fund balance of approximately $19.5 million.

However, the SEC maintains the school district was involved in deficit spending en route to a negative $7.2 million ending fund balance.

Additionally, the SEC indicated the Sweetwater Union High School District, without admitting or denying any findings, agreed to settle with the SEC and consented to the entry of an SEC order finding that it violated two Sections of the Securities Act and would engage an independent consultant to evaluate policies and procedures related to its municipal securities disclosures.

The SEC noted Michel, without admitting or denying the allegations in the agency's complaint, agreed to settle with the SEC and be enjoined from future violations of the charged provision, as well as from participating in any future municipal securities offerings while agreeing to pay a $28,000 penalty. The settlement is subject to court approval, per authorities.

"As the order finds, Sweetwater and Michel presented stale and misleading financial information as current and accurate," LeeAnn G. Gaunt, chief of the Division of Enforcement's Public Finance Abuse Unit, said. "The SEC will continue to address deceptive conduct that prevents municipal bond

investors from getting an accurate picture of the financial risks of their investments."

FINANCIAL REGULATION NEWS

BY DOUGLAS CLARK | SEPTEMBER 20, 2021

Firm Settles SEC Charges For Prioritizing "Flippers" In Municipal Offerings: Cadwalader

In separate Orders, a municipal securities firm, the head of the firm's sales, trading and syndication group, and the head of the firm's syndicate desk settled SEC charges (see here, here, and here, respectively) for inappropriately allocating municipal bonds to "flippers" (i.e., unregistered brokers that buy and sell bonds at a profit).

The SEC found that between January 2014 and December 2017 the firm failed to follow its "standard methodology" when serving as a sole underwriter or senior syndicate manager in negotiated offerings in which it allocated bonds. The SEC stated that the firm's methodology required it to prioritize the fulfillment of customer, dealer, syndicate member and other broker-dealer orders over flipper orders.

The SEC found that:

- on 41 separate occasions, the firm did not prioritize institutional customer or dealer orders over flipper orders, even when it had more orders than available bonds;
- on three separate occasions, the firm knowingly did not allocate bonds per issuer instructions, offering them to flippers before retail customers; and
- in instances in which the firm did not act as a participating underwriter, it caused flippers to act as unregistered broker-dealers by acquiring new issue municipal bonds from the flippers and compensating them on the basis of the transactions.

In addition, the SEC determined that both the head of the firm's sales desk and the head of the syndicate desk were aware of the improper conduct.

The SEC found that the respondents violated MSRB Rules G-11(k) ("Retail Order Period Representations and Required Disclosures") and G-17 ("Conduct of Municipal Securities and Municipal Advisory Activities") and Section 15B(c)(1) ("Discipline of municipal securities dealers; censure; suspension or revocation of registration; other sanctions; investigations") of the Exchange Act. In addition, the SEC found that the firm violated MSRB Rule G-27 ("Supervision") and caused violations of SEA Section 15(a)(1) ("Registration of all persons utilizing exchange facilities to effect transactions; exemptions").

To settle the charges, respondents agreed to (i) a censure, (ii) cease and desist from future violations, and (iii) $150,000, $30,000 and $25,000 civil money penalties, respectively, of which a portion will be sent to the MSRB. The firm also agreed to pay $713,327 in disgorgement and prejudgment interest.

by Cadwalader, Wickersham & Taft LLP

22 September 2021

NFMA Accepting Applications for At-Large Seats on the 2022-2023 Board of Governors.

We are accepting applications for At-Large seats on the 2022-2023 Board of Governors

Applications are due by October 1, 2021. To apply, click here.

Please contact Lisa Good at lgood@nfma.org if you have questions.

RBC Capital Settles with SEC for $800K Over Muni Bond Dealings.

RBC Capital Markets has agreed to pay more than $800,000 to settle charges that the firm engaged in unfair dealing in municipal bond offerings, according to the Securities and Exchange Commission.

The SEC alleges that between January 2014 and December 2017, RBC Capital Markets allocated bonds meant for institutional customers and dealers to unregistered brokers known as “flippers,” according to an SEC order published on Friday last week. The flippers, in turn, sold the bonds to other broker-dealers at a profit, according to the SEC.

RBC Capital Markets agreed to the censure and to pay $863,326 without admitting or denying the SEC’s findings. The amount included a $150,000 penalty, disgorgement of $552,440 and prejudgment interest of $160,886, according to the SEC.

In three specific instances, the SEC said RBC Capital Markets went as far as to violate instructions from an issuer that the firm prioritize retail customers first and that “RBC knew or should have known that flippers were not eligible for retail or institutional priority.”

“RBC improperly acquired new issue municipal bonds for the firm’s inventory by placing orders with the flippers to circumvent the lower priority that issuers typically assigned to non-syndicate dealer orders in offerings that it did not underwrite,” according to the SEC order.

RBC Capital Markets is registered with the SEC as a broker-dealer, municipal securities dealer, investment advisor and municipal advisor.

The municipal bond offering violations are among the SEC’s focus areas. The regulator says it has taken action against municipal bond offering flipping and other retail order period violations eight times since August 2018, including in July 2020 when it ordered UBS Financial Services to pay $10 million over similar allocation violations, which the firm agreed to do without admitting or denying the findings.

SEC Orders UBS to Pay $10M for Violating Municipal Bond Offering Rules
“We will continue to pursue those who undermine priority rules and crowd out legitimate retail or institutional customers from getting access to newly issued municipal bonds,” LeeAnn Gaunt, chief of the SEC division of enforcement’s public finance abuse unit, said in a statement.

Separately, the SEC issued orders against former RBC Capital Markets head of municipal sales, trading and syndication Kenneth Friedrich and the head of its municipal syndicate desk, Jaime Durando. The agency said that Friedrich and Durando “permitted the improper allocation and sale of

new issue bonds to the flippers, and that Friedrich also permitted the improper purchase of new issue bonds for RBC's own inventory through the flippers."

Friedrich and Durando each agreed to a censure and to pay $30,000 and $25,000, respectively, according to the SEC. Friedrich also consented to a six-month limitation on supervisory activities and a six-month prohibition on trading negotiated new issue municipal securities.

Friedrich was registered at RBC Capital Markets from 1999 to 2017, while Durando has been at registered at the firm since 2006, according to their BrokerCheck records.

Financial Advisor IQ

By Andrew Kessel

September 20, 2021

Amendments to Rule G-10 Notification Requirement for Dealers: SIFMA Comment Letter

SUMMARY

SIFMA submitted comments to the Securities and Exchange Commission ("SEC") on the Municipal Securities Rulemaking Board's ("MSRB's") Filing of a Proposed Rule Change Consisting of Amendments to Rule G–10, on Investor and Municipal Advisory Client Education and Protection, and Rule G–48, on Transactions With Sophisticated Municipal Market Professionals, To Amend Certain Dealer Obligations (the "Filing").

SIFMA supports many elements of the proposed amendments, which reduce the compliance burden on the dealer community without reducing investor protections. The proposed amendments will render potential cost savings, and each customer notification that no longer needs to be printed or mailed will reduce the environmental impact of this process.

Read the Comment Letter.

SEC Approves MSRB Extension for Municipal Advisor Principal Qualification Examination: Cadwalader

The SEC approved an MSRB proposal to extend the deadline for a municipal advisor principal to become qualified by passing the Series 54 examination on line. As a result, the deadline was extended from November 12, 2021 to November 30, 2021.

The extended deadline "roughly coincides with the number of days taken to launch the Series 54 examination online" and is effective immediately. Comments on the extension must be submitted by October 7, 2021.

September 16 2021

Cadwalader Wickersham & Taft LLP

A Big Bond Market Headache, Courtesy of the SEC.

Chair Gary Gensler wants to bring greater efficiency and transparency to debt trading, but an updated rule could do just the opposite.

U.S. Securities and Exchange Commission Chair Gary Gensler made waves in the fixed-income market earlier this week, signaling that he wants to find ways to "bring greater efficiency and transparency" to trading debt.

Yet beneath the surface, the regulator is just days away from potentially causing serious disruptions in those same bond markets.

An obscure SEC rule, 15c2-11, was amended a year ago for the first time in almost three decades. The change, which is meant to improve disclosure and investor protection in over-the-counter trading markets, sounds innocuous enough on its face. It ensures "that broker-dealers, in their role as professional gatekeepers to this market, do not publish quotations for an issuer's security when current issuer information is not publicly available."

There's one big problem: The rule, which had long been understood to safeguard retail investors from penny stocks and other "pump-and-dump" schemes, doesn't explicitly exclude fixed-income assets, except for municipal bonds. The Bond Dealers of America, a trade association for securities dealers and banks specializing in fixed income, says SEC staff have informally confirmed that the rule applies equally to both equities and debt.

"The industry is mildly freaking out," Kevin McPartland, head of research in Greenwich Associates' market structure and technology group, said in an interview. Firms must be compliant with the amendment on Sept. 28. "Dealers can't operationally make that happen in that span of time. If nothing changes, at the end of the month they may have to stop quoting some bonds," he said.

To get a sense of the level of panic, look no further than an Aug. 6 joint letter from the Securities Industry and Financial Markets Association and the BDA, which are seeking an exemption:

> "We are concerned that the rule as written could apply broadly to quotation activity for fixed income securities, and that the application of the rule to quotations for fixed income securities will deter that quotation activity in a way that will have a significant, deleterious effect on the fixed income markets. We believe that such an application of the rule is overbroad and unnecessary and will increase costs, decrease liquidity, and reverse the gains in transparency that the fixed income markets have achieved in recent years as the market has become more electronic."

In other words, this rule change could do precisely the opposite of what Gensler was advocating for in his prepared remarks before the Senate Banking Committee.

An earlier letter in May from the BDA details how it would affect certain corners of the bond market. Non-government guaranteed mortgage-backed securities, for instance, are issued through trusts, meaning each transaction is unique. Under the amended rule, traders would have to review updates to each underlying pool of mortgages if they wanted to quote a price for a bond. Another example: A security is exempt from the rule if its average daily trading volume is at least $100,000 during the 60 calendar days before giving a price quote. That might save benchmark bonds from AT&T Inc.,

General Electric Co. and Microsoft Corp., but it could paralyze the secondary market for high-yield debt, where companies are more often private, smaller and opaque.

Throughout the letter, the BDA can barely hide its incredulity at the whole situation. The group summarizes its position like this:

> "The bond market simply is not the high risk, low transparency world of microcap stocks. Moreover, applying the Rule to fixed income would increase compliance costs for dealers, which ultimately would be reflected in higher transaction costs for investors. Finally, adding additional requirements before a firm can provide a quote or execute a trade for a customer could discourage firms from quoting certain securities altogether."

As far as I can tell, this looming compliance headache hasn't been discussed much anywhere, aside from these letters. That's likely because bond traders assumed the SEC couldn't possibly have intended to rope mortgage-backed securities and junk bonds into its Exchange Act Rule 15c2-11, given the gigantic size of those markets relative to a few hundred thinly traded stocks. Yet for now, that's exactly what it's doing.

"Until April of this year, I've never paid attention to this rule because this was not a fixed-income rule," Michael Decker, the BDA's senior vice president of federal policy and research, said in an interview. "The SEC has now taken the position that the rule already applies to fixed income and it has always applied."

The rule was changed when Jay Clayton was the head of the SEC. In a statement announcing the amendment, he applauded the long-overdue shifts to address fraud in markets with significant amounts of retail investors. That sure doesn't sound much like private-label MBS and high-yield debt, which are dominated by institutions.

"I don't think the SEC has thought through this," Decker said. In light of Gensler's recent remarks, " it's wise for everybody to take a few steps back, think about what enforcement policies will look like."

An SEC spokesperson didn't reply to an emailed request for comment.

Bloomberg Markets

By Brian Chappatta

September 16, 2021

Gensler Turns Spotlight on How Hard It Can Be to Get Bond Prices.

- **SEC chair wants to 'bring greater efficiency and transparency'**
- **Fed's pandemic bond market rescue a source of concern**

After U.S. Securities and Exchange Commission Chairman Gary Gensler signaled he may overhaul bond market regulations, industry experts zeroed in on just how opaque trading can be.

Gensler, who testified Tuesday before the Senate Banking Committee, said in prepared remarks released beforehand that he wants to "bring greater efficiency and transparency" to the trading of

corporate bonds, municipal bonds and mortgage-backed securities. He offered little detail on what new rules might look like.

Market watchers have suggestions, a year after a liquidity breakdown early in the pandemic forced the Federal Reserve to backstop the bond market. A big source of angst: especially when compared with other key financial assets like stocks, it can take a lot more effort to figure out the price of a bond.

“Pre-trade transparency is a focus,” said Kumar Venkataraman, a finance professor at Southern Methodist University and former member of the SEC’s Fixed Income Market Structure Advisory Committee. “If you’re a large, sophisticated investor, you receive quotes from many dealers and see the best price. If you’re less sophisticated, you might get a less competitive bid.”

15 Minutes

Currently, corporate bond trades must be reported to the Financial Industry Regulatory Authority’s Trace system no more than 15 minutes after they’re executed — a deadline that feels like an eternity in the era when stock and futures traders fret about microseconds.

And before trades are placed, there are no publicly available price quotes. To get those can require making phone calls or sending electronic requests for quotes to a bunch of banks and brokers.

A potential solution would require bond brokers to report their offered prices to a centralized system, which is how it’s worked in the U.S. stock market since the 1970s. That could make the business more efficient by stitching together all the different markets where bonds trade. In stocks, for instance, all orders are supposed to be automatically routed to the market with the best price.

“We think the solution is to consolidate all credible bids and offers into a central system and display that information publicly,” said Christopher White, the chief executive officer of bond market data provider BondCliQ Inc. “Once you create that centralized architecture, you start to see the quality of the data and the market improve.”

Sell-side banks have little incentive to provide greater transparency, since it could cut into their profits. And reporting quotes could be a costly and time-consuming process that banks currently have little interest in participating in, Venkataraman said.

Don’t expect corporate bonds to begin trading in a centralized system like equities anytime soon, says Kevin McPartland, head of research for market structure at Coalition Greenwich.

‘Very Different’ Market

“The bond market is still very different from the equity market in terms of how it trades and in terms of the market participants,” he said. “Bond markets are by and large institutional markets. So we have a very informed consumer if you will.”

There is also “post-trade reporting, and a lot of private sector work to improve pre-trade price transparency,” he added. “The buy side has pushed for it, and the platforms and data providers have really pushed to make pre-trade price transparency better. So I’m not sure we need to regulate something that’s effectively already happening.”

The bond-market crisis of March and April 2020 is fresh in regulators’ minds. Government officials appear to view the unprecedented steps taken by the Fed in March 2020 as a mandate to address long-standing concerns that bond liquidity disappears in bad times.

The giants of finance, meanwhile, are more apt to view the global pandemic as a once-in-a-century event that doesn't justify upending how the corporate bond business runs in normal environments.

Gensler has targeted market transparency before. The opacity of the swaps market was one of the reasons why the 2008 financial crisis was so severe, since it was extremely difficult to untangle the connections between Wall Street banks who held the derivatives. Gensler, as chairman of the U.S. Commodity Futures Trading Commission, oversaw a push to get more of that business done on public markets.

Bloomberg Markets

By Jack Pitcher

September 14, 2021, 11:35 AM MDT

U.S. SEC Chair Wants Private Fund Fee Disclosures, Bond Market Transparency - Testimony

WASHINGTON (Reuters) – The chair of the top U.S. securities regulator wants private funds to disclose more information to investors about potential conflicts of interest and the fees they charge, according to congressional testimony published Monday evening.

Gary Gensler, chair of the Securities and Exchange Commission (SEC), also wants to impose greater transparency on the corporate bond, municipal bond and asset-backed securities market, which combined are worth about $28 trillion, he wrote in the testimony submitted to the Senate Banking Committee.

Gensler will appear before the congressional panel on Tuesday to field questions on his agenda for the regulator.

"I believe we can enhance disclosures in this area, better enabling pensions and others investing in these private funds to get the information they need to make investment decisions," Gensler wrote.

In the bond markets, meanwhile, trading data is often insufficient, causing liquidity crunches during times of stress, which was evident during last year's market turmoil sparked by the COVID-19 pandemic.

"This market is so critical to issuers. It is nearly 2.5 times larger than the commercial bank lending of about $10.5 trillion in our economy," Gensler wrote in his testimony, without elaborating on the changes he may pursue.

Addressing fund fees and the bond market add to an already jam-packed agenda for the SEC, which is working on new corporate climate change-risk disclosures, cracking down on blank-check company deals, and overhauling several aspects of the U.S. equity market structure.

Also on Monday, Gensler, writing in a Wall Street Journal op-ed, urged Chinese companies to open up their books and records to SEC scrutiny or risk being kicked off U.S. exchanges.

(Writing by Michelle Price; Editing by Leslie Adler)

September 13, 2021

SEC Charges High School District CFO with Misleading Investors.

Dive Brief:

- The Sweetwater Union High School District and its former CFO, Karen Michel, settled claims that they misled investors in a $28 million municipal bond offering, the Securities and Exchange Commission says.
- The SEC alleged that Michel and the Chula Vista, Calif.-based school district, in San Diego County, gave investors misleading budget projections and hid the fact that its finances "were severely strained."
- Michel and the public school district said the district would conclude 2021 with $19.5 million in its general fund, the SEC alleges, but later revealed that the school had overspent its budget by $28 million, resulting in a year-end deficit of $7.2 million.

Continue reading.

CFO Dive

by Jane Thier

Sept. 17, 2021

SEC Reaches Settlements with Sweetwater Union District, Ex-CFO for Filing False Reports.

CHULA VISTA, Calif. (CNS) – The Securities and Exchange Commission announced Thursday that it has entered into a settlement agreement with the Sweetwater Union High School District and its former Chief Financial Officer to resolve allegations that the district misled investors who purchased $28 million in municipal bonds.

The SEC alleged that in 2018, the school district and former CFO Karen Michel gave investors misleading budget projections indicating it would end the fiscal year with a general fund balance of around $19.5 million when it was actually on track for a negative $7.2 million ending fund balance.

The agency said that despite contradictory internal reports, the district and Michel included the projections in its offering documents and presented them to a credit rating agency. Michel also signed "multiple certifications falsely attesting to the accuracy and completeness of the information included in the offering documents," the SEC said.

While neither settlement includes admissions or denials of the SEC's allegations, Michel agreed to settle with the SEC and pay a $28,000 penalty, while the district entered into an SEC order that requires it to retain an independent consultant to evaluate and make recommendations to its procedures regarding its municipal securities disclosures.

When reached for comment, the school district said in a statement, "The district looks forward to

implementing the improvements and changes outlined in the SEC's order. It will continue to take steps to ensure it provides accurate disclosures and information to the public."

The district's statement also said the settlement "represents another positive step in the district's ongoing remedial efforts to continuously evaluate and improve its fiscal health."

LeeAnn G. Gaunt, chief of the SEC's Public Finance Abuse Unit, said, "As the order finds, Sweetwater and Michel presented stale and misleading financial information as current and accurate. The SEC will continue to address deceptive conduct that prevents municipal bond investors from getting an accurate picture of the financial risks of their investments."

fox5sandiego.com

Sep 16, 2021

SEC Settles with San Diego-Area School District and Former CFO.

The Securities and Exchange Commission has settled with Sweetwater Union High School District in San Diego County, California, as well as its former chief financial officer Karen Michel for misleading investors in connection with an issuance of $28 million of municipal bonds.

The Commission charged Michel with violating Section 17(a)(3) of the Securities Act of 1933, and she agreed without admitting or denying the allegations to pay a $28,000 penalty. She is barred from participating in future municipal securities offerings and agreed to refrain from future violations.

Sweetwater, without admitting or denying guilt, violated Sections 17(a)(2) and 17(a)(3) of the Securities Act, the SEC said, and is required to convene with an independent consultant to evaluate its policies and procedures in relation to its municipal securities disclosures.

"As the order finds, Sweetwater and Michel presented stale and misleading financial information as current and accurate," said LeeAnn G. Gaunt, chief of the division of enforcement's public finance abuse unit. "The SEC will continue to address deceptive conduct that prevents municipal bond investors from getting an accurate picture of the financial risks of their investments."

Michel, who worked within Sweetwater Union High School District's financial services department from 1996 to 2018, failed to accurately budget for a 3.75% pay raise approved shortly before the beginning of the 2018 fiscal year, the SEC found.

Instead of adding these increases to the district's expenses, Michel allegedly instead projected expenses nearly identical to the expenses incurred during the 2017 fiscal year, which took into account a less than 1% increase in employee compensation.

The Commission also found that despite Sweetwater's mid-year budget monitoring reports consistently showing higher expenses than the previous year, Michel made no effort to bring its budget in line with the actual expenses.

The April 2018 $28 million bond offering documents then included misleading budget projections

which indicated the district could cover its costs and would end the year on June 30, 2018 with a general fund balance of $19.5 million, when in reality it ended the year with a negative $7.2 million balance.

After Michel's retirement in September 2018, her successor completed an unaudited actual financial report finding year-end salaries were actually $18.7 million higher than what was estimated by Michel, leading to a drop in Sweetwater's rating to BBB+ from A.

The Commission found that the related disclosures failed to reveal Sweetwater's true financial condition, that the 2018 budget projections were inconsistent with its actual expenses, and that Sweetwater's budget monitoring procedures did not consider current conditions.

These types of actions aren't novel for the Commission, as a number of other educational institutions have faced enforcement action for similar infringements, including Park View School in Arizona and California's Tri-Valley Learning Corporation in 2020.

While the SEC has not hesitated to bring actions against school districts, the Commission rarely seeks monetary penalties against municipal issuers because that penalty is ultimately borne by taxpayers who were not implicated in any wrongdoing.

Lawyers for Michel and Sweetwater failed to respond to requests for comment.

By Connor Hussey

09/16/21

BY SOURCEMEDIA

RBC Capital Markets to Pay More than US$800K to Settle U.S. SEC Charges.

TORONTO — RBC Capital Markets LLC has agreed to pay more than US$800,000 to settle U.S. Securities and Exchange Commission charges over the way municipal bond offerings were allocated.

The U.S. regulator said Friday that over a nearly four-year period that RBC improperly allocated bonds intended for institutional customers and dealers.

The SEC says the bonds went to "flippers," who then resold or "flipped" the bonds to other broker-dealers at a profit.

"We will continue to pursue those who undermine priority rules and crowd out legitimate retail or institutional customers," said LeeAnn Gaunt, head of the SEC's Public Finance Abuse Unit.

The SEC said that without admitting or denying the findings, RBC consented to a public administrative and cease-and-desist order that found it violated provisions around disclosure, fair dealing, and supervision and that it failed to supervise some of its registered representatives.

The bank on Friday said it had no comment on the case.

RBC was ordered to pay a US$150,000 penalty, disgorgement of US$552,440, plus prejudgment interest of US$160,886.

The SEC also settled charges against Kenneth Friedrich, RBC's former head of municipal sales, trading and syndication, and Jaime Durando, the head of RBC's municipal syndicate desk.

Friedrich agreed to a censure and to pay a civil penalty of US$30,000. Durando agreed to a censure and to pay a civil penalty of US$25,000.

The Canadian Press

This report by The Canadian Press was first published Sept. 17, 2021.

RBC Resolves U.S. SEC Charges Over Bond Abuses, is Fined.

Sept 17 (Reuters) – A Royal Bank of Canada (RY.TO) unit was censured and will pay more than $863,000 to resolve U.S. regulatory charges it broke rules meant to give retail and institutional investors priority in buying new municipal bonds.

In a civil settlement announced on Friday, the U.S. Securities and Exchange Commission said RBC Capital Markets LLC improperly allocated bonds to investors known as "flippers" who quickly resold their bonds to other broker-dealers at a profit.

Municipal bonds are typically issued by states, cities and school districts to fund operations and projects, and contain tax advantages over corporate and U.S. government bonds.

The SEC said RBC knew or should have known that giving priority to flippers violated its rules on bond offerings it underwrote.

It said RBC also improperly bought new bonds it had not underwritten from flippers, rather than wait in line to buy those bonds from the underwriters.

The alleged violations occurred from 2014 to 2017.

RBC's payout includes a $150,000 civil fine, plus disgorgement and interest.

Two RBC officials, head of municipal syndication Jaime Durando and former head of municipal sales Kenneth Friedrich, were also censured by the SEC and fined a combined $55,000. Friedrich left the bank in 2016.

None of the defendants admitted or denied wrongdoing. RBC closed the flippers' accounts and improved surveillance to help avert a recurrence.

RBC declined to comment. Lawyers for the other defendants did not immediately respond to requests for comment.

The SEC has reached several settlements over flipping abuses in municipal bonds, including a $10 million accord with Switzerland's UBS AG (UBSG.S) in July 2020.

Reporting by Jonathan Stempel in New York; Editing by Chizu Nomiyama and Dan Grebler

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RBC to Pay More Than $863K to Settle Charges over Muni Bond Sales.

RBC Capital Markets agreed to pay more than $863,000 to resolve charges that it circumvented procedures aimed at giving institutional and retail investors priority allocations in certain municipal bond offerings over a four-year span, the Securities and Exchange Commission announced on Friday.

From January 2014 and December 2017, RBC improperly allocated bonds to "flippers," unregistered traders who then resold the bonds to other broker-dealers at a profit. In three instances, RBC also violated the issuer's instructions to give retail investors priority and instead sold them first to flippers, the SEC said. RBC used its relationship with the flipping firms to improperly obtain bonds for its own inventory in cases where it was not the underwriter, according to the order.

"RBC did not always follow the standard methodology when it did not have priority instructions from issuers, and, in 41 instances when orders exceeded the bonds available, it failed to prioritize institutional customer and/or dealer orders ahead of flipper orders," the SEC said in the order.

The SEC charged RBC with violating the order disclosure, fair dealing, and supervisory provisions of Municipal Securities Rulemaking Board Rules and the related Exchange Act provision. The settlement includes a censure, a fine of $150,000, disgorgement of $552,440, plus prejudgment interest of $160,886.

A spokesperson for RBC declined to comment. The firm settled the charges without admitting or denying the findings, the SEC said. The agency sued the so-called flipping firms, RMR Asset Management and Core Performance Management, separately in 2018.

The SEC has pursued related violations more than half a dozen times since 2018, with one of the largest resulting in a $10 million fine against UBS Financial Services in July 2020.

In its case against RBC, it also brought charges against Kenneth G. Friedrich, RBC's former head of Municipal Sales, Trading and Syndication, and Jaime L. Durando, the head of RBC's municipal syndicate desk, who agreed to pay fines of $30,000 and $25,000, according to the SEC's press release and orders. In addition, Friedrich consented to a six-month limitation on supervisory activities and a six-month prohibition on trading negotiated new issue municipal securities, the SEC said.

The SEC found that Friedrich and Durando permitted the "improper allocation and sale of new issue bonds to the flippers," and that Friedrich also allowed for the "improper purchase of new issue bonds for RBC's own inventory through the flippers," it said in a press release.

The two agreed to cease-and-desist orders, without admitting or denying the findings, the SEC said.

Friedrich did not respond to a request for comment left on social media, and Durando did not respond to a similar request, left with the spokesperson.

"We will continue to pursue those who undermine priority rules and crowd out legitimate retail or institutional customers from getting access to newly issued municipal bonds," LeeAnn G. Gaunt, chief of the SEC's Division of Enforcement's Public Finance Abuse Unit, said in a statement.

advisorhub.com

by Miriam Rozen

September 17, 2021

SEC Fines Ex-Broker for Retail Order Period Scheme.

A former broker has agreed to be barred from the industry and pay a $40,000 penalty to settle Securities and Exchange Commission charges he dishonestly obtained new-issue bonds meant for retail customers, instead placing orders on behalf of broker-dealers.

The settled proceeding against Anthony Falsetta, announced Tuesday, is the latest in a string of SEC cases targeting violations of retail order periods. Some of that conduct has been labeled “flipping,” though that is not an official legal term, because of the practice of “flipping” the bonds to other broker-dealers at a profit. Falsetta did not admit nor deny the SEC’s findings.

“Between January 2016 and April 2018, Falsetta violated retail order period priority provisions in certain new-issue municipal bond offerings by placing orders for broker-dealers, who were attempting to buy bonds for their inventory, as retail customer orders,” the SEC found. “Falsetta did so despite knowing that pursuant to issuer priority rules, orders on behalf of broker-dealers do not qualify for retail priority.”

According to the SEC, Falsetta earned about $122,353 in commissions on 106 retail allotments he sold to Hilltop and Wells Fargo (WFC) while acting as a broker at Philadelphia-based Drexel Hamilton. As an institutional sales representative, Falsetta marketed new-issue municipal bonds that Drexel Hamilton was offering.

The SEC found that Falsetta in January 2016 contacted Daniel Tracy, a Hilltop representative who was the subject of a separate SEC action in July, and invited him to submit orders for new-issue bonds. Falsetta had previously worked together with Tracy at a different firm, and Falsetta knew the orders would be for Hilltop’s inventory, the SEC said. Falsetta had a similar arrangement with an unnamed Wells Fargo (WFC) representative, the SEC found.

“Falsetta understood that the stock orders he received from Tracy and Trader A did not qualify for retail priority,” the SEC found. “Falsetta submitted these orders as retail to create the false appearance that they were submitted on behalf of an individual rather than on behalf of a broker-dealer.”

The SEC has been worried about this and similar conduct for several years now, in part because it risks crowding legitimate retail purchasers out of offerings. In perhaps the most significant of these cases, the SEC in 2018 charged two firms and 18 individuals with operating a wide-ranging scheme to circumvent retail order restrictions.

Further cases followed, some linked to that initial case. Last year Roosevelt & Cross Inc. and its CEO agreed to pay some $1 million to settle the SEC’s charges linked to that flipping investigation.

The SEC said Falsetta took certain steps to conceal his activity, including delaying writing the sales tickets for the orders until the bonds were “free to trade.” This created the false appearance that the bonds were sold in the secondary market, the SEC alleged.

Falsetta’s conduct violated the anti-fraud provisions of the securities laws, as well as Municipal Securities Rulemaking Board rules G-17 on fair dealing and G-11 on primary offering practices.

Falsetta signed a statement attesting to his inability to pay disgorgement, though under the terms of the settlement he will pay the $40,000 civil penalty in installments. He can reapply to be eligible for a securities license after three years.

By Kyle Glazier

BY SOURCEMEDIA | 08/31/21

Which Side Are You On? Municipal Broker/Dealer Takes Both Sides.

On Aug. 26, 2021, the U.S. Securities and Exchange Commission ("SEC") instituted enforcement proceedings against Rush F. Harding III, the 65-year-old co-founder of Crews & Associates, Inc. ("Crews"), a Little Rock, Arkansas, broker/dealer and municipal advisor, and against Crews for unfair dealings in the bonds of Ohio County, West Virginia. County offices are in Wheeling, West Virginia. In 2006 the County issued $81 million of bonds bearing interest at 8.25%, and which had a make-whole provision, making calling them prohibitively expensive. In 2007 Crews began a business relationship with the County, and by 2015 had underwritten nine bond offerings for the County.

Municipal Broker
Harding, on behalf of Crews, organized two tender offers (in 2012 and 2014) to purchase the outstanding 2006 bonds, as market interest rates had fallen significantly since 2006, making an offer at a price higher than the market for the 2006 bonds, an attractive way for the County to reduce its debt service costs. The County funded the buybacks by issuing new lower interest rate bonds underwritten by Crews. Crews then purchased approximately $1 million of the 2006 bonds on the open market at 106.69% of par. It then sold those bonds to two Crews customers.

In 2015 Crews again bid on the 2006 bonds, buying $3.12 million at 107.2% of par, $2.5 million of which it sold to a Crews affiliate of which Harding was also the CEO. The County did not in any of these transactions retain a municipal advisor to represent its interests, "relying instead (per the SEC) on its relationship with, and the expertise of, Crews."

As required by Municipal Securities Rulemaking Board ("MSRB") Rule G-17, on Dec. 14, 2015, Crews sent the County a disclosure letter that documented the relationship between Crews and the County and acknowledged its obligations to deal fairly with the County. That letter asserted that it " had not identified any potential or actual material conflicts that required disclosure." Crews did not disclose that it had acquired through its affiliate $2.5 million of the 2006 bonds. Before the tender offer urged by Crews, Crews continued to purchase 2006 bonds for the affiliate.

Dealer Takes Both Sides
In December 2015, the tender offer was priced at 110% of par. When the tender closed in February 2016, the affiliate tendered 71% of the 2006 bonds tendered to the County. The SEC noted that the tender resulted in "significant savings" for the County. In connection with the tender, the SEC also found that Harding and Crews violated MSRB Rule G-27 for failing to have adequate supervisory systems. Crews made a net profit of $34,631; Harding was paid $36,524 in commissions; and the affiliate made a net profit of $27,153.

Harding and Crews consented to the entry of the SEC enforcement proceedings. As a result, Harding was censured and ordered to pay disgorgement of $36,524, as well as a civil penalty of $100,000. Crews was also censured, ordered to disgorge $44,072, and ordered to pay a civil penalty of $200,000. Ohio County and the rest of the capital markets might benefit not only from considering the way in which it and its tax-paying citizens were victims, but also from considering the frequency of abuses in the offering of municipal securities. See my Sept. 29, 2020 Blog "What if the Advice is Suspect? Municipal Securities Advisor Registration and Dereliction."

Thursday, September 2, 2021

MSRB Compares ATS And Broker's Broker Trading Platforms: Cadwalader

The Chief Economist for the MSRB analyzed the effect of electronic trading technology by comparing trading activity on alternative trading systems ("ATSs") with broker's broker platforms.

The author drew the following conclusions:

- ATS platforms (i) are more likely to include inter-dealer trades that are smaller and involve municipal securities with "complex features" (g., insured bonds and bonds with call features) and (ii) provide more robust search functions as compared to broker's broker platforms.
- ATS platforms appear to promote "visible liquidity and price discovery," particularly for municipal securities that are not commonly traded or well-known.
- Broker's broker trading platforms may be geared more towards trading for institutional investors and dealer's principal positions.

The MSRB emphasized that the analysis was "preliminary" and the results "may warrant further investigation."

31 August 2021

by Cadwalader, Wickersham & Taft LLP

NFMA Accepting Applications for At-Large Seats on the 2022-2023 Board of Governors.

We are accepting applications for At-Large seats on the 2022-2023 Board of Governors

Applications are due by October 1, 2021.

To apply, click here.

Please contact Lisa Good at lgood@nfma.org if you have questions.

Cities and States on the Frontline of Climate Change Aren't Always Upfront about Risks. Does the Municipal Bond Market Care?

Are some of our most popular regions becoming uninhabitable?

In mid-August, as water in the Colorado River dwindled, the Metropolitan Water District of Southern California declared a "water supply alert," asking its 19 million customers to voluntarily conserve water. With many California counties already in a state of drought, mandatory restrictions could be

put in place in the coming months, Governor Gavin Newsom said.

A few months earlier, officials in Miami-Dade County made a very different announcement, releasing a splashy "Sea Level Rise Strategy" that attempted to answer the question "how can we gracefully, strategically live with two feet of additional sea level rise?" But one environmentalist told the New York Times the blueprint fell short, offering "just enough to reassure developers that Miami's safe enough to build in."

Across the country, state and local governments are hustling to tackle challenges from changing climate, while simultaneously preparing for things to only get worse. It raises uncomfortable questions: at what point is Miami's waterlogged coastline just too wet? How many 100+-degree days can Phoenix, the country's fastest-growing city for the fifth-straight year, handle?

We're barely prepared for the immediate complications, forget the existential ones, public finance professionals say. Government officials often are loathe to admit the dangers their communities face. There is no standard guidance or regulation on how to document climate risk, let alone mitigate it.

More to the point, anyone looking for discipline from the $4 trillion municipal bond market, which funds state and local governments and their projects, will be disappointed.

"It's just amazing, the power of the (muni-bond) tax exemption and the avoidance of taxes. It's an unbelievable force in America," said Thomas Doe, president of Municipal Market Analytics, a Massachusetts-based provider of muni-bond market data.

"Look at the migration to Florida, Texas, and Arizona," Doe said. "You may be able to live there for a short period of time, but it's not going to be a 20-year experience." He calls it denial: "It won't happen while I'm living there." "I can't believe there will be a day when water won't come out of the tap."

Researchers at the Brookings Institution came to the same conclusion in a working paper published last September.

"In municipal finance, there appears to be almost no meaningful disclosure of climate-related risks," the researchers wrote. "Using some of the latest science projecting spatially resolved potential climate impacts, we show that there is no detectable difference in the level of municipal disclosure between communities most at risk from climate change and those least exposed to physical impacts."

"A central challenge seems to be not analysis but imagination," they add.

It's not just the thousands of ordinary Americans flocking to the "smile states" in search of sun and lower taxes — or the people buying tax-exempt bonds — who add to the risk, Doe says. The entire municipal market makes it possible for people and resources to migrate to areas that arguably may be least prepared to receive them.

Take California's Metropolitan Water. In June, the utility sold $100 million of bonds to refinance some that had been issued earlier. It has $2.6 billion in bonds outstanding, which carry the top possible rating from the two largest rating agencies, Moody's and S&P Global.

Metropolitan does note the risks posed by climate change, from flooding that puts pressure on its infrastructure to drought that may limit its supply, in its bond offering statement. But it adds, "Metropolitan is unable to predict with any certainty how climate change will ultimately affect Metropolitan or State water supplies or whether Metropolitan will be required to take additional mitigation measures."

In early August, some of the bonds maturing in 2033 traded at 140.67, well above par — the 100 price typically due at maturity — in a sign investors will are willing to pay handsomely to look past all that uncertainty for the next 12 years.

“These risks are not incorporated in the municipal market. At all,” Doe told MarketWatch. “Because investors want the tax exemption, they’re not saying ‘no’ because they want the product. They don’t discern risk. It’s not a prioritized risk in the ratings. So the rating agencies aren’t penalizing the issuer, no-one is telling the issuer you have to disclose risks. No-one wants their cost of capital to go up.”

Ratings

The Brookings paper takes aim at the bond raters. While acknowledging that credit firms cannot fully disclose their methodology, the researchers still found what they call big gaps.

Among other things, they note, when Moody’s, S&P and Fitch address climate risk, it tends to be backward-looking, rather than proactive. The paper highlighted a 2017 Moody’s downgrade of Puerto Rico bonds, as an example: “Hurricane Maria hits in September 2017; the next month Moody’s downgrades the (Puerto Rico) revenue bond out of revenue concerns but still makes no mention of climate change affecting the probability of Maria-like events in the future.”

“I understand that particular criticism,” said Marcy Block, senior director of sustainable finance for Fitch. (Moody’s did not respond to a request for comment.)

Fitch does include a climate risk component (called an “ESG relevance score”) in all of its ratings, Block said, and some issuers — in the Florida Keys, for example — are graded as higher-risk because of capital needs relating to flooding and other environmental impacts.

“(S&P Public Finance) specifically incorporates an ESG paragraph into our issuer-level credit rating reports and research to provide transparency on how ESG factors may affect a particular entity’s credit profile,” the credit firm said in emailed remarks. It also discloses if one of its steps was driven by an ESG (environmental, social or governance) factor, the group said.

“There’s a recognition that there’s still more that can be done,” Fitch’s Block said. “I think it’s clear that the disclosure so far from issuers has been very weak. Whether that’s driven by investors continuing to demand more information or regulatory change, I think you’ll see more and more disclosure coming forward.”

Regulators

Many market participants are hoping for more clarity and enforcement from regulators. In March, the U.S. Securities and Exchange Commission announced an evaluation of climate-change disclosures. The SEC and federal prosecutors have since opened probes into whether a subsidiary of Deutsche Bank overstated its use of sustainable investing criteria, according to a Wall Street Journal report, citing people familiar with the matter.

Enforcement efforts might go only so far. The SEC might look to extract fines from fund managers who make misleading ESG claims or it might go after issuers who knowingly obscure risks. But its role isn’t to set standards that will force issuers to identify their risks, disclose them, and get rated on them.

Mark Kim is CEO of the Municipal Securities Rulemaking Board (MSRB), which sets rules around trading and transacting in the muni market but, like the SEC, does not have the ability to set issuer standards. In an interview with MarketWatch, Kim said, “There’s certainly more work to be done. I

think the market's understanding of climate risk is evolving. Today, reasonable investors consider climate risk to be material."

Ideally, all disclosure would be standardized, not just a reflection of whatever quirks belong to particular issuers, Kim noted, so "investors can compare apples to apples."

Asked whether Congress should amend its charter so the MSRB could make disclosure rules, Kim said, "That's a really important policy question. We will leave it to Congress to decide."

Investors

"We recognize that climate risk is a real threat, it's not just some secular theme that's 10, 20 years out. It's here now," said Sean McCarthy, head of the municipal credit research team for $2.2 trillion money manager PIMCO.

"I think disclosure is the area where people want to see more," McCarthy told MarketWatch. "It's getting better, but it's a risk factor that needs to be discussed. Large borrowers, bellwether borrowers, like the state of California, are pretty good at it. Where it could be better is on the local government level but, there's a cost associated with. I think states could help out a little bit more."

McCarthy also thinks industry-wide standards would be ideal, but like any institutional investor, his team will still do its own credit analysis, he said.

He offered one example: PIMCO rates single-site project bonds in coastal areas lower and demands a slightly higher yield as compensation for taking on additional risk. And he noted that the municipal market broadly agrees, paying less for such bonds than it does for similar inland deals — but only by about 5 basis points.

As previously reported, demand for municipal bonds has run so hot in recent months that it's pushed yields to all-time lows (yields move in the opposite direction as prices) and inflows to mutual and exchange-traded funds have smashed weekly records multiple times in 2021.

MMA's Doe notes a muni-market irony: some of the country's climate-change hot spots, like California and Florida, are also some of the wealthiest, where demand for tax-exempt investments is highest. He believes the municipal tax exemption is one of the biggest reasons the market looks the other way, rather than confronting climate risk.

Issuers

To be sure, plenty of people think the worst-case scenarios people dream up are simply too pessimistic. For example, McCarthy calls the question of out-migration from some of the country's most popular areas "generational."

"I am worried about population trends," he said, but views tax policy as an immediate catalyst of migration trends.

Some municipal officials argue they're far more prepared than the market may realize. Mark Hartman, a Canadian who moved to Phoenix several years to take a role as that city's chief sustainability officer, points out that his adopted hometown has always been a desert, adapting to heat long before anyone worried about manmade climate change.

"People here, it's in their DNA," Hartman told MarketWatch. "Just like the trees here are desert-adapted. We look at innovative projects and policies that will help cool our city."

In a study conducted by Arizona State University, which makes Phoenix a sort of climate-change

living laboratory, two city neighborhoods just two miles apart were found to have a temperature difference as high as 13 degrees, pointing to the efficacy of climate mitigation efforts like planting trees, “cool pavement” technology, and more, Hartman said.

But the tricky thing about climate change is that it represents, well, change — not necessarily the same challenges communities faced in the past.

“The latest science about climate change shows the system changing rapidly, with synergistic impacts that will have substantial and growing impacts on physical assets and public welfare, including the economic viability of communities on the front lines,” the Brookings researchers wrote.

“Extensions of the latest climate science suggests that plausible tail risks are even larger and more immediate. The problem of disclosure reflects a problem of imagination.”

Doe likes to talk about climate risk in three stages: denial, which he thinks we’ve largely moved beyond, defense, and departure.

We are now in the “defend mode,” he said. “There will be rationales made as to why an investment should be made to preserve a community. We’ll build gates or drains to protect us. We’ll establish resilience committees. But will it be sufficient? Does anyone have the timing right? And then, is that the best use of the money?”

No family likes to prepare for death, but eventually most of us write wills, he said. Similarly, “no-one wants to say a place is going to become uninhabitable.”

MarketWatch

By Andrea Riquier

Aug. 28, 2021

Characteristics of Municipal Securities Trading on Alternative Trading Systems and Broker’s Broker Platforms.

Did you know market share of alternative trading systems (ATS) and broker’s broker platforms makes up 58% of inter-dealer trades?

MSRB Chief Economist Simon Wu tracks how electronic muni trading on such platforms affects the market in his latest paper.

Underwriter Settles SEC Charges for Failing to Disclose Conflicts: Cadwalader

An Arkansas-based broker-dealer and its former CEO settled SEC charges for fair dealing violations arising from a municipal bond tender offer.

In separate orders, the SEC found that, at the instruction of the former CEO, the broker-dealer recommended to a West Virginia county that it (i) effect a tender offer for bonds issued in 2006 in order to decrease its outstanding debt service expense, (ii) offer to purchase the outstanding bonds

from the bondholders and (iii) bankroll the purchase of the bonds by selling new bonds with a lower interest rate that the broker-dealer would underwrite. According to the SEC's findings, the broker-dealer and its former CEO failed to disclose to the county when making those recommendations that it and its affiliates had recently purchased and sold a significant amount of the bonds that were the subject of the tender offer, which bonds were then sold back to the county at a significant profit.

As a result of its findings, the SEC determined that (i) the broker-dealer and its former CEO violated MSRB Rules G-17 ("Conduct of Municipal Securities and Municipal Advisory Activities") and G-27 (" Supervision") and (ii) the former CEO caused the broker-dealer to violate Section 15B(c)(1) ("Discipline of municipal securities dealers; censure; suspension or revocation of registration; other sanctions; investigations") of the Exchange Act.

To settle the charges, the broker-dealer and former CEO each agreed to (i) a censure, (ii) cease and desist from future violations, (iii) pay $44,072 and $46,481 in disgorgement and prejudgment interest, respectively, and (iv) pay $200,000 and $100,000 in civil money penalties, respectively. In addition, the former CEO agreed to "certain undertakings and limitations on activities."

Cadwalader Wickersham & Taft LLP

August 26 2021

Legislative Path Forward for Key Muni Legislation.

Yesterday, the House advanced the $3.5 trillion budget reconciliation framework, a legislative vehicle to be used for additional infrastructure spending after weeks of back-and-forth between a small caucus of Democratic moderates and House Leadership. The group pushed for a vote on the Senate bipartisan infrastructure package before advancing the budget framework, however, conceded, pushing the vote to September 27th setting up what will likely be a legislative battle through the fall.

With multiple infrastructure packages moving through Congress in the coming months, below is a primer on the status of key municipal bond legislation and prospects for each spending package:

Bipartisan Infrastructure Package

Earlier this month, the Senate passed a $1 trillion infrastructure spending package that includes nearly $600 billion in new funding. While a new direct-pay bond was originally included in the Senate outline, the American Infrastructure Bond was removed from the package due to a lack of offsets and the inability to reach a consensus on reimbursement rates. **While light on key municipal provisions, the bill relies heavily on the usage of PABs, including:**

- **The package would allow states to issue PABs to finance broadband deployment, specifically for projects in rural areas where a majority of households do not have access to broadband;**
- **Permit carbon capture and direct air capture (DAC) technologies to be eligible for PAB financing. These bonds would be 75 % exempt from the volume cap;**
- **The bill increases the current cap of tax-exempt highway or surface freight transfer facility bonds from $15 billion to $30 billion as proposed by the bipartisan BUILD Act (S.881). Currently, $14,989,529,000 billion of the $15 billion cap has been issued or allocated.**

As part of the House negotiations this week, the legislation will be brought to the House floor by September 27th, and will almost certainly become law shortly thereafter setting the stage for the budget reconciliation package that will include additional infrastructure spending, possibly including munis, following through on the Biden Build Back Better Agenda.

Infrastructure Focused Budget Reconciliation

Following the passage of the bipartisan package, the Senate turned its attention to the next phase of infrastructure spending, a robust budget reconciliation outline that provides the ability for an additional $3.5 trillion of federal spending. While initial policy details are light by design, through discussions with key Hill and Administration staff, the MBFA and BDA believe that municipals with receive consideration in the tax title of this potential package, with House Ways and Means Chairman Richie Neal (D-MA) a key ally for the municipal bond industry, helping to guide the path.

We remain focused on the municipal provisions included in the LIFT Act which was introduced earlier this year by House Ways and Means Member Terri Sewell (D-AL). This package includes:

- **The reinstatement of tax-exempt advance refundings,**
- **Raise the BQ debt limit, and**
- **Creation of a new direct-pay bond exempt from sequestration.**

While we believe municipals will play a role in this package, the road towards passage will likely be narrow. Senate and House moderates have pushed back at the $3.5 trillion price tag, so we expect that to come down substantially for passage. We remain focused on the LIFT Act provisions as they have support in both Chambers and remain a common-sense infrastructure solution at a low cost to the Federal government.

The MBFA and BDA will continue to provide updates as they become available.

Bond Dealers of America

August 25, 2021

SEC Fines Firm and Ex-CEO for Failing to Disclose Conflict of Interest.

Arkansas-based Crews & Associates has agreed to pay more than $200,000 and its former CEO more than $100,000 to settle Securities and Exchange Commission charges they violated fair dealing and supervision rules by failing to disclose the firm’s relationship with an affiliate that profited from business the firm did with a West Virginia county.

The SEC announced the settled administrative proceedings against the firm and former CEO Rush Harding III Thursday, a significant enforcement action that is only the third muni case of 2021 following a busy 2020 for the Public Finance Abuse Unit.

The charges stem from Crews? October 2015 recommendation that Ohio County, West Virginia, reduce its debt burden through a tender offer for bonds it had issued in 2006.

The SEC said that following the discussions of the tender offer, Crews, with Harding’s approval, purchased millions of dollars of the county’s outstanding bonds and sold them to an entity affiliated

with Crews and to Crews' customers. Almost all of the bonds Crews acquired were eventually sold to its affiliate and tendered back to the county at a price that Crews had recommended, resulting in a net profit to the affiliate.

"In municipal bond offerings, underwriters must fully disclose to issuers their financial interests in the deal," said LeeAnn G. Gaunt, chief of the Enforcement Division's Public Finance Abuse Unit. "Failure to do so is a violation of their obligation to deal fairly with issuers."

Both Crews and Harding agreed to the settlements without either admitting or denying the SEC's findings.

The 2006 bonds, maturing in 2035 and bearing interest at 8.25%, contained a make-whole call provision that rendered calling them cost-prohibitive, and an ordinary refunding or advance refunding impractical, the SEC said. Crews had a business relationship with the county since 2007, and had underwritten nine bond offerings for it.

According to the SEC, Crews recommended that the county offer to pay bondholders a price higher than the current market price of its outstanding bonds to incentivize bondholders to tender their bonds. Crews also recommended that the county fund its purchase of those previously issued bonds through the sale of new, lower interest rate bonds, which Crews would underwrite. When Crews made these recommendations, the SEC found, the firm did not disclose to the county that Crews had recently acquired more than $1 million of the county?s outstanding bonds at market prices and then sold them to two customers.

In the months following the initial discussions of the tender offer, the SEC alleged, as Crews and the county finalized the terms of the proposed transaction, Crews purchased some $4.8 million more of the county's outstanding bonds at market prices and sold them to an affiliated entity and to Crews' customers. Almost all of the bonds Crews acquired were eventually sold to the affiliate and tendered back to the county by the affiliate at a price that Crews had recommended. Crews did not disclose to the county that the affiliate had acquired bonds to be tendered, or the resulting conflict of interest created by the affiliate's financial interest in the tender offer, the SEC said.

The county authorized the issuance of $10 million of new municipal bonds to fund its purchase of the 2006 bonds. In January 2016, the notice of tender was publicly posted, with the maximum acceptable price set at 110% of par.

Crews then continued to buy 2006 bonds from third parties and from Crews customers at market prices, in some cases mark them up, and selling them to the affiliate, the SEC said.

By the time of the tender date, Crews had purchased $5.9 million in principal value of the bonds on behalf of its affiliate. On the tender date of Feb. 16, 2016, the affiliate offered to tender all of these bonds to the county's tender agent at the maximum acceptable price. Since the county did not receive a sufficient number of tender offers at prices lower than the maximum acceptable price, the county accepted the offer of the affiliate.

In all, the SEC found, the affiliate tendered 71% of all 2006 bonds that were tendered to the county. The deal did save the county money, the SEC found.

But as a result of the markups it charged on its transactions with its customers and the affiliate, Crews made a net profit of $34,631. The affiliate made a net profit of $27,153 as a result of its purchases of the bonds from Crews and its tender of those same bonds to the county.

MSRB Rule G-17 requires broker-dealers to deal fairly with all market participants, which the SEC

said the firm violated by failing to make the county aware of the secondary market transactions going on. MSRB Rule G-27 requires that firms have in place a supervisory system reasonably designed to ensure compliance with all applicable securities laws and rules, but the SEC found that Crews' system provided no means of accountability and so the transactions were not reviewed as they should have been.

By violating these rules, the SEC found, Crews violated Section 15B(c)(1) of the Securities Exchange Act, which prohibits dealers from using the mail or "any means or instrumentality of interstate commerce" to execute municipal securities transactions in violation of any MSRB rule.

Crews agreed to pay a civil penalty of $200,000 and disgorgement of $34,631 and prejudgment interest of $9,441. The SEC said Crews has already taken steps to correct the supervisory problems that led to the action.

"Crews and Associates is pleased to resolve this matter and is now looking to the future," said Paul Maco, a Bracewell attorney who represented the firm. Maco said the firm is devoting its full attention to serving its customers and growing its business.

Harding agreed to pay a $100,000 penalty and disgorgement of $36,524 and prejudgment interest of $9,957. Harding, who is still a registered broker, may not participate in new issues or tender offers for 12 months. An attorney for Harding did not respond to a request for comment.

By Kyle Glazier

BY SOURCEMEDIA | MUNICIPAL | 08/26/21 12:45 PM EDT

August Issue of GFOA's Government Finance Review.

This month's issue of *Government Finance Review* puts a spotlight on state banks. Are state banks a useful economic development tool with future promise?

Other topics from the magazine include budgeting bias, strengthening risk management, a spotlight on GFOA scholarship recipients, and more.

Financial Accounting Foundation Trustees Announce Appointment of New Chair of the Governmental Accounting Standards Advisory Council (GASAC)

Norwalk, CT—August 24, 2021 — The Board of Trustees of the Financial Accounting Foundation (FAF) announced today the appointment of Elizabeth (Beth) Pearce as Chair of the Governmental Accounting Standards Advisory Council (GASAC). Ms. Pearce's term will begin January 1, 2022.

Ms. Pearce currently serves as the Treasurer for the State of Vermont. She is the state's banker and investment officer. In her role, she manages short and long-term debt, the administration of three retirement systems, unclaimed property funds, and plays an advisory role to state policy makers.

The GASAC advises the Governmental Accounting Standards Board (GASB) on strategic and technical issues, project priorities, and other matters that affect standard setting. The GASAC

provides the GASB with diverse perspectives from individuals with varied governmental, professional, and occupational backgrounds.

The FAF Board of Trustees appointed Ms. Pearce as a member of the GASAC, nominated by the National Association of State Treasurers, beginning January 1, 2021. She will succeed Mr. Robert W. Scott, who joined the GASAC in 2011 and became Chair in 2015.

“It is a pleasure to welcome Beth Pearce as our new GASAC Chair. She will play an important role in the GASB process,” said Kathleen L. Casey, Chair of the FAF Board of Trustees. “We would also like to thank our departing Chair, Robert Scott, for his time, expertise, and the contributions he made to the standard-setting process,” she added.

For a complete list of current Council members, visit the GASAC webpage.

Treasury Guidance on Non-Entitlement Units is Now Available.

The United States Treasury has issued guidance on non-entitlement units (NEUs) providing additional information on eligibility and a step-by-step guide for states to allocate and distribute funds to their NEUs. States should follow the guidance and calculate allocations based on the list of local governments and their respective populations. The statute requires that all allocations to eligible governments be based on population. Treasury expects to make payments to states for distribution to NEUs in two equal tranches approximately twelve months apart.

NASACT

MSRB Offers Remote Municipal Advisor Principal Exam.

The MSRB will allow individuals seeking to qualify as municipal advisor principals to take the Municipal Advisor Representative Qualification Examination (the “Series 54 Exam”) online. The accommodation is temporary and intended to address persistent COVID-19 challenges.

To schedule an online test, individuals must submit an interim accommodation request form to FINRA. Once this is processed by FINRA, individuals may schedule a test appointment online. Information on the sign-up process and exam will be published during the week of August 15, 2021, on a dedicated webpage on MSRB.org.

The MSRB will also seek to extend the relief under Supplementary Material .09 (“Temporary Relief for Municipal Advisor Principal”) to MSRB Rule G-3 (“Professional Qualification Requirements”) from the current compliance date of November 12, 2021.

Cadwalader, Wickersham & Taft LLP

13 August 2021

What Will the End of LIBOR Mean for the Multifamily Industry?

Learn what's happening with the switch to a new loan index.

The multifamily housing industry is moving closer to phasing out its long-standing index for adjustable-rate loans and other financial transactions.

The London Interbank Offered Rate (LIBOR), which covers five currencies and seven tenors, is on its way out after years of being a globally accepted benchmark. The Alternative Reference Rates Committee (ARRC), a group of private-market participants convened by the Federal Reserve and the New York Fed, has identified the Secured Overnight Financing Rate (SOFR) as LIBOR's replacement.

LIBOR was supposed to be retired by the end of this year, but that date has been extended to June 30, 2023, for most U.S. LIBOR values. The one-week and two-month LIBOR will still expire at the end of 2021.

"In commercial real estate, floating interest rates are commonly indexed off LIBOR," says Steven Fayne, principal at Align Finance Partners. "However, its uses span far more than just mortgages. Corporate loans, government bonds, credit cards, swaps, and myriad other financial products currently use LIBOR as a benchmark."

Citi Community Capital (CCC), a leading provider of financing for affordable housing, uses one-month LIBOR swap rates for floating-rate construction loans and other community development floating-rate loans. In addition, CCC uses LIBOR swap rates to establish fixed rates for permanent period fixed-rate loans, according to Barry Krinsky, national production manager.

Despite LIBOR's widespread use and long history, U.S. financial regulators have been pushing for the change to SOFR because it is believed to be a better and more resilient rate. One reason for this is the sample size for calculating LIBOR has been declining since the Great Recession. There's now less than $1 billion a day in transaction volume compared with $1 trillion a day for SOFR, says Blake Lanford, managing director in the trading department at Walker & Dunlop.

Other key differences are also driving the move. LIBOR is an average of interest rates reported by major banks, and some have been accused of misrepresenting their numbers to achieve better returns. SOFR, a broad measure of the borrowing of cash overnight collateralized by Treasury securities, is based on actual transactions rather than a survey.

"LIBOR is forward-looking, so the one- and three-month LIBOR is an expectation of where it would be one or three months in advance based on a forward curve," says Lanford. "SOFR is currently backward-looking, using a 30-day average."

What's Happening in Multifamily

Fannie Mae and Freddie Mac moved over to using SOFR for their variable-rate loans last September.

"There were a few months when there was some optionality, but they wouldn't accept anything after December that was LIBOR-based," says Lanford.

"Everything now from Fannie and Freddie is SOFR-based on new loans."

CCC also is planning on ceasing the use of LIBOR for new loans and issuing SOFR loans in the coming months, according to Krinsky.

The firm has chosen the new index, he says, “in part because the SOFR benchmark when combined with the lending spread is expected to result in our multifamily borrowers achieving all-in borrowing rates similar to what they achieved with the LIBOR benchmark.”

In the affordable housing world, the use of LIBOR is somewhat limited. Adjustable-rate loans are uncommon in low-income housing tax credit deals because housing credit investors do not want the variable-rate exposure.

However, these loans are seen in some Section 8 transactions and during the construction phase of some affordable housing deals. Adjustable-rate loans are also seen in conventional multifamily property loans.

For the overall multifamily industry, the big unknowns are how and when will lenders transition the loans in their portfolio that use LIBOR. They’re going to have to move over to SOFR at some point.

When that transition happens there’s going to have to be a spread added to minimize any value transfer from the rate changing in favor of the investor, or borrower, says Lanford.

The good news is that many existing contracts will expire before LIBOR is phased out in mid-2023, so the parties won’t have to alter the pricing methodology currently used, according to Fayne.

“For contracts that use LIBOR as a benchmark and expire after 2023, the reference rate will need to change,” he says. “However, it’s highly likely that those contracts include ‘fallback language’ prescribing how the loan will be priced in the event LIBOR rates are no longer available.”

The next big action is expected to take place this month. “The big banks are being asked to switch over to SOFR at least on the interdealer interest-rate swaps by July 26,” says Lanford. “Once that happens, there’s going to be more progress.”

This step will cause trading activity among swap dealers on these platforms, which account for a substantially large share of trading in the interest rate swap markets, to switch from LIBOR to SOFR.

That’s going to create a more robust market, and that will be necessary to build a forward-term rate like there is for LIBOR. “We have a one-month and a three-month LIBOR,” Lanford says. “They’re trying to develop the same thing for SOFR. Right now, there’s plenty of transactions on the front end, but not as much as on longer-term futures and swaps contracts. The switch on July 26 will change that.”

Looking ahead, it’s important for developers to know what their variable-rate exposure is. “There may be some borrowers that have a schedule of real estate that’s 100% fixed rate, and they don’t have much to worry about,” he says. “For those who have some variable-rate exposure, planning in advance and matching up their loans along with any other derivatives is going to be a priority. Unfortunately, there’s not much that we know yet as far as timing, but try to anticipate that switch.”

Walker & Dunlop will provide lots of notice to the loans in its portfolio, and Fannie and Freddie will work to give as much lead time as possible as well, according to Lanford.

With representatives of the Federal Reserve and ARRC saying that SOFR should be used, developers should be cautious about loans that use a different benchmark. “I think the recommendation will soon be to think hard before using LIBOR or alternative indexes other than SOFR,” Lanford says.

Affordable Housing Finance

By Donna Kimura

July 12, 2021

Public Pension Looters Need Not Fear FBI And Law Enforcement.

The FBI's investigation into alleged false investment performance at the $67 billion Pennsylvania Public School Employees' Retirement System may suggest law enforcement is finally focused upon public pension shenanigans. That's not likely.

If you want to understand how pension looters and high-level investment scammers frequently escape prosecution, begin with studying the legal and regulatory structure of the money management industry. Successful scammers know: (1) which laws or regulations they can skirt, or break; (2) who, i.e., which agencies may come after them for their bad behavior; and (3) the limitations of different regulators and law enforcement.

A "security" is a broad term that includes many types of investments, such as municipal bonds, corporate stock and bonds, bank notes, investment contracts and more. Securities fraud occurs when someone involved with one of these investments lies, cheats, or steals in an attempt to gain a financial advantage.

Continue reading.

Forbes

by Edward Siedle

Aug 16, 2021

The Conclusion of a Long Running Pay-to-Play Case.

Many of the cases brought recently by the Commission have been either offering fraud or microcap issuer cases with the latter often centered on pump-and-dump manipulations. These cases typically fleece unsuspecting investors who purchase what appear to be inexpensive securities based on some type of guaranteed return or assurance against lost in the case of offering fraud actions or the lure of quick profits from an about to increase stock in the case of the manipulations. The outcome in all of these cases is the same – the investors lose their hard earned savings.

Some cases follow a different pattern. For example, some cases involve public officials taking a bribe in return for steering business to others. In those cases the pattern is different but for investors it is the same, they lose although it may not be as apparent. Once such case is *SEC v. Webb*, Civil Action No. 17-8685 (N.D. Ill.), a pay-to-play case.

Defendant David Webb is the mayor of the City of Markham, Illinois. In connection with a 2012 municipal bond offering designed to fund city capital projects, Mr. Webb engaged in a pay-to-play scheme. The mayor approached a contractor involved in the city capital projects and solicited a bribe. In return Mr. Webb agreed to steer a multi-million construction project to the contractor. The project would be funded from the offering proceeds of the municipal bond offering.

The complaint alleges violations of Securities Act Section 17(a) and Exchange Act Section 10(b). To resolve the action Mr. Webb consented to the entry of a permanent injunction based on the Sections cited in the complaint in late 2017. This week the Court entered the final judgment after determining monetary remedies. The Court entered permanent injunctions based on the Sections cited in the complaint. The mayor was also barred from participating in further municipal bond offerings. In addition, Mr. Webb was directed to pay disgorgement of $85,000 and prejudgment interest of $32,849.35. Those amounts were deemed satisfied by the restitution order entered in the parallel criminal case. *See* Lit. Rel. No. 25160 (August 9, 2021).

SEC Actions – Thomas O Gorman

August 12 2021

Transaction Costs During the Covid-19 Crisis: MSRB White Paper

MSRB publishes new research paper analyzing the evolution of transaction costs in the municipal and corporate bond markets during the COVID-19 liquidity crisis and the subsequent recovery.

Read the paper.

MSRB Proposes Amendments to Annual Customer Notification Requirements.

The MSRB proposed amendments to narrow the scope of the annual customer notification requirements under MSRB rules on delivery of investor brochures and transactions with sophisticated municipal market professionals.

The MSRB filed with the SEC amendments that would narrow the scope of the annual customer notification requirements under MSRB Rule G-10 (“Delivery of Investor Brochure”). The amendments would limit the persons dealers would have to notify to only those who either (i) have effected municipal securities transactions or (ii) hold a municipal securities position.

The proposal also includes amendments to MSRB Rule G-48 (“Transactions with Sophisticated Municipal Market Professionals”) that would except dealers from making such annual notifications to sophisticated municipal market professionals, so long as the required information is available on the dealer’s website.

Comments on the proposal must be submitted within 21 days of its publication in the Federal Register.

Cadwalader Wickersham & Taft LLP

August 3 2021

S&P: USPF Enterprise Sectors Treatment Of Operating Leases Under FASB's

ASU 2016-02 (ASC 842)

Background

S&P Global Ratings is updating the market with its views on the Financial Accounting Standard Board's (FASB) new standard, Leases (ASC-842), and its impact on audited financial statements of rated entities in the not-for-profit health care, higher education, charter schools, and public power and electric cooperative sectors, which S&P Global Ratings collectively refers to as enterprise sectors. With the standard now in effect for a greater number of rated entities that report under FASB standards, we are providing additional information on the treatment of operating leases under our enterprise sectors criteria. We had published an FAQ, "How New Accounting Rules Will Affect U.S. Enterprise Sectors," on March 11, 2019, on RatingsDirect and this update supersedes that commentary.

We will continue to review our approach to incorporating lease liabilities into our analysis of enterprise sectors pursuant to our criteria, particularly as governmental issuers in the enterprise sectors implement lease updates through the Governmental Accounting Standards Board (GASB) Statement No. 87-Leases after a substantial delay in the required implementation date (see last section, titled "How will GASB No. 87 impact our analytical approach to leases?") to fiscal years beginning after June 30, 2021. Since GASB No. 87 changes how leases are classified, effectively no longer recognizing the operating lease distinction, we will expect to maintain consistency and comparability across the two accounting standards, to the extent possible given nuances associated with each standard, as the enterprise sectors have entities that present financial statements under both FASB and GASB standards.

Not all of our rated FASB entities have incorporated the new lease standard, yet. In response to concerns of the impact that the Coronavirus (COVID-19) pandemic could have on stakeholders, the FASB released ASU 2020-05 in June 2020, which delayed the effective implementation dates for ASC 842 for certain public not-for-profit entities which had not yet issued financial statements reflecting adoption of the standard, which includes obligors that use conduit issuers, and all other not-fo--profit entities. Early adoption continues to be permitted. While a number of entities we rate have adopted the standard, certain entities have not yet adopted the standard due to FASB's delay of the effective implementation date.

Frequently Asked Questions

Will the lease accounting requirements result in rating changes?
Lease accounting requirements enhance transparency and add to robustness of disclosures, but are generally not expected to result in rating changes, nor have they in the past for rated entities that have adopted the standard. While the financial statement presentation under ASC 842 provides more clarity on the actual value of the lease liability, the actual lease obligations incurred by rated entities largely have remained unchanged; therefore, the accounting standards update has not been viewed as a new credit factor. We believe the financial effect of existing operating leases has been incorporated into our credit ratings and related analyses prior to the ASC 842 update.

How do we incorporate lease usage into our analysis of enterprise sector obligors?
We will assess lease usage by the following measures:

Health care. Operating lease liabilities are typically not included in our calculation of long-term debt and related ratios, and we continue to believe that our lease-adjusted maximum annual debt service (MADS) coverage metric appropriately captures lease utilization within our assessment of the financial profile. Further, as per our criteria, we retain the flexibility to make an analytical

judgment as to whether a negative consideration is warranted for the entities where liabilities or off-balance-sheet financings, including operating leases, materially bring added risk to the financial profile when not fully captured in debt to capitalization or other financial metrics. While we recognize that in certain cases the audited presentation of operating lease expense may now encompass additional expenses, such as variable lease costs, in most instances we are able to adjust for this such that operating lease expense remains comparable with prior periods, which typically consisted solely of operating and short-term lease costs. To date, there have been no rating changes driven by the change in accounting for operating leases among rated not-for-profit health care entities that have adopted ASC 842.

Higher education. While our criteria treats capital leases as debt, we have not generally treated operating leases as debt and have not included them in our MADS burden or total debt ratios. However, we review an institution's operating leases and in cases where we deem those operating leases significant compared with debt, we have assessed them in some capacity (e.g., either by including them in the MADS burden or in total debt calculations). Pursuant to our criteria, we reserve the right to adjust aspects of the financial profile assessment in order to adequately capture the risk associated with elevated operating lease usage. Since implementation of FASB ASC 842 (applicable to private colleges and universities, independent schools and some public universities that elect to follow FASB accounting standards), none of our ratio definitions and their applications have changed and, related to this matter alone, there have not been any changes in our opinion of an institution's underlying creditworthiness.

Charter schools. Pursuant to our criteria, operating lease liabilities are typically not included in our calculation of long-term debt and related ratios. However, for charter schools, we have consistently incorporated the use of operating leases into our rating analysis through our use of lease-adjusted MADS when calculating key financial ratios, such as debt service coverage (DSC) and debt burden. For example, we calculate lease-adjusted MADS coverage as earnings before interest, depreciation, and amortization plus facility lease expense/MADS plus facility lease expense. Lease-adjusted MADS coverage is generally the heaviest weighted component of our financial profile assessment for rating charter school bonds. We reserve the right to adjust aspects of the financial profile assessment when we deem the lease-adjusted MADS coverage and debt burden to insufficiently capture the risk associated with elevated lease usage.

We will continue to analyze the effect of implementation on all entities that use operating leases and update our view of the underlying creditworthiness accordingly.

Public power and electric cooperatives. Our long-standing practice has been to treat lease agreements as having debt-like attributes irrespective of whether accounting standards dictate classifying power purchase agreements as finance or operating leases. We reflect these adjustments in our fixed-charge coverage calculations, which we perform in addition to our DSC calculations. Our fixed-charge coverage focuses on payments utilities make to utility suppliers to reserve generation capacity and to their retail customers. Because we are already capturing the dominant lease and lease-like payments in our fixed-charge coverage, we believe that the changes in accounting standards do not affect coverage ratio analysis for public power and electric cooperative utilities.

When do we consider operating lease usage to be significant and compel additional adjustments to our standard ratios?

The analytic decision to make an additional adjustment within the financial profile assessment of an obligor could reflect various lease factors such as our view of the magnitude of the operating lease liability relative to the capital structure, structural elements of the leases, and the perceived strategic risk of the leasing strategy. In those instances where we believe these lease factors are not

fully captured in our ratios, we reserve the flexibility in our criteria to apply a negative adjustment in the financial profile section of the criteria. While rare, there have been instances where we have applied a negative adjustment within the financial profile section of our criteria.

How do we expect accounting for leases to differ under FASB ASC 842 compared with GASB No. 87?

Based on our initial understanding of GASB No. 87, we expect that after its implementation, most lease arrangements previously classified as operating or capital leases, will be considered finance leases, which we typically include in long-term debt. Therefore, we believe this difference in lease accounting reporting requirements under GASB compared with FASB complicates the ability to separate lease liabilities from long-term debt. However, the underlying economics of lease arrangements are unchanged solely due to the new accounting standard, so we generally do not anticipate rating changes associated with the GASB No. 87 standard. We will review whether the presentation of GASB No. 87 requires us to revisit the details of how we incorporate operating leases into our criteria–specifically as it relates to debt and coverage-related ratios.

How will GASB No. 87 affect our analytical approach to leases?

We expect to maintain analytical consistency in our approach to evaluating lease obligations and to maintain comparability across rated entities within sectors regardless of whether the rated entities follow GASB or FASB accounting standards, to the extent possible given the incongruity of the two accounting pronouncements. While early adoption is permitted, to date, S&P Global Ratings has not seen the specifics of how GASB No. 87–applicable to most public colleges and universities, community colleges, hospital districts, public transportation, public housing, local governments, and public power entities–will present on financial statements.

More broadly, since the GASB update on leases will affect all USPF credits, we will update the market on our views regarding leases beyond the enterprise sectors, including all government entities in USPF.

This report does not constitute a rating action.

30 Jul, 2021

The Use Of A Crisis To Create Opportunity In The Muni Market.

The Coronavirus pandemic has led to death, tragedies and social and economic disruptions. Most of the disruption was unavoidable and unknowable and some individuals actually saw opportunities to create services and products that would be welcomed in this environment. Others, however, saw opportunities to use the economic disruption to achieve gains by playing on the publics' fear. The municipal bond market is highly vulnerable to fear based abuse because of its mediocre performance in public disclosure and a weak secondary market.

While the municipal market is no stranger to abusive practices in bond issuance and secondary market pricing, its greatest vulnerability is in its failure to police ongoing disclosure compliance. The

Municipal Securities Rulemaking Board, or MSRB, has been given the responsibility for overseeing disclosure practices, but has little enforcement power or staff to maintain order in this massive and unregulated market. The SEC can step in to curb abuse since they do have a broader mandate, but they appear to have priorities elsewhere.

My concern today is that large investors in existing issues are using their ability to manage the information flow about a specific project to discourage smaller investors and motivate them to sell their bonds which they can then buy up at below their true value. Remember that the municipal secondary market is not a truly competitive market and even less so when the required public information filings are not being made. Their motivation for this are as diverse as:

- A need to restructure the bonds. Buying up other holders' bonds reduces their haircut on their holdings.
- Seeing the need to provide additional funding to the project which would benefit others as well.
- Seeing a high coupon long maturity bond issue which can be re-purposed for a more viable project.
- An opportunity to profit from investors fearing the worst as they tend to do when the information flow is not there.

So how does one hold back on the information flow and create an information vacuum:

- Own or gain control of 25% or more of the bonds. Trustee's, who are the main enforcers of the disclosure and payment requirements love to obtain guidance from such a proportion of bondholders in order to avoid being liable for anything they do or fail to do.
- Stop interest payments and maturity redemptions even if there are reserve funds available. This is usually justified as being done to preserve funds for legal actions or other contingencies.
- Reach a standstill agreement with the project owner whereby he too comes under the control of the majority bondholders who can then manage his information flow and other actions.
- Stop public reporting of the projects status and keep bondholders informed by teleconference where there is no written record of what was said.
- Minimize the information any non-current bondholder can see in order to make a competing price offer.
- Let the brokerage firms, who make a market in specific bonds, know you are a buyer and at what price.

You would think that the bond trustee would exercise some professional responsibility here when he senses what is happening. More likely is that he will resign from the account if he feels vulnerable or is removed if he starts to act responsibly. Note that I have never seen a notice of a trustee resignation or removal that gave a cause. This can be need-to-know information, but good luck with that.

Bank trustees' loyalty is first to themselves, next to the obligor who pay them their annual fees and then to the bondholders representing 25% or more of an issue. And don't expect any help from the bond issuing authority who are lending their name and provenance to the bonds. They will go out of their way to tell you that they have absolutely no liability on the bonds, which translates into also having no concern with how bad a bond issue is from inception.

Forbes

by Richard Lehmann

Aug 9, 2021

MSRB Announces New Board Members for Fiscal Year 2022.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today announced four new members to serve on the governing board of the self-regulatory organization charged by Congress with protecting municipal securities investors, issuers and the public interest. The new members will serve four-year terms beginning October 1, 2021.

“We strive to build a Board that is diverse, inclusive and reflective of the wide variety of perspectives that contribute to the field of public finance,” said Caroline Cruise, Chair of the Board’s Nominating Committee. “This year’s class is outstanding, with a diversity of backgrounds and expertise that will make a lasting contribution to our market. My fellow Board members and I look forward to working alongside them to implement our new strategic plan and ensure our regulatory, transparency and data initiatives advance our long-term goal of strengthening market efficiency and transparency.”

New public members joining the MSRB Board in Fiscal Year 2022 are: Jennie Huang Bennett, Chief Financial Officer for the City of Chicago, and Katano Kasaine, Assistant General Manager and Chief Financial Officer at the Metropolitan Water District of Southern California. Joining the Board as regulated members are: Warren “Bo” Daniels, Atlanta-based Managing Director and Head of Public Finance of Loop Capital Markets, a minority-owned dealer firm based in Chicago, IL, and Liz Sweeney, President and founder of Nutshell Associates, LLC, a Maryland-based municipal advisory firm. The new Board members were selected from more than 60 applicants this year.

Congress established certain minimum requirements for Board composition, and all Board members are required to be individuals of integrity and knowledgeable of matters related to the municipal securities markets. The Board consists of four “classes” with staggered terms, with a new class elected annually in accordance with Congressional requirements and MSRB rules. Learn how the puzzle pieces come together to optimize representation on the Board.

For FY 2022, the Board will have 15 members, including eight independent public members and seven members from MSRB-regulated broker-dealers, banks and municipal advisors. The size of the Board was reduced as part of a series of governance enhancements that also tightened standards of independence for public members and established a lifetime service limit for Board members. To facilitate the transition to a smaller Board, the term of a current public member on the Board, Donna Simonetti, has been extended one year.

The MSRB recently announced that it has elected Patrick Brett, Managing Director and Head of Municipal Debt Capital Markets at Citi in New York, to serve as FY 2022 Chair of the Board. Meredith L. Hathorn, Managing Partner, Foley & Judell, L.L.P. in Baton Rouge, LA, will serve as Vice Chair.

New MSRB Board Members, Fiscal Year 2022

Jennie Huang Bennett is Chief Financial Officer for the City of Chicago, where she oversees financial strategy and policy and a $13 billion total budget, manages a $26 billion portfolio of City of Chicago debt, and directs financial policy for a number of City agencies, among other things. Prior to her service at the City, Ms. Bennett served as Chief Financial Officer for Chicago Public Schools. She began her career with Morgan Stanley’s Municipal Securities Division in New York and ultimately served as Executive Director in Chicago. Ms. Bennett has also served on the boards of directors of several organizations, including Perspective Charter Schools, Chicago Opera Theater

and Women in Public Finance. Ms. Bennett earned a bachelor's degree in political science and economics from the University of Pennsylvania.

Warren "Bo" Daniels is Managing Director and Head of Public Finance of Loop Capital Markets, a minority-owned firm based in Chicago, IL. He is based in Atlanta and has been the senior banker on over $45 billion of financings during his career and worked on numerous higher education, general obligation, sales tax, transportation, water and sewer, single/multi-family housing, and financial products transactions, as well as complex asset-backed and structured financings. He has extensive experience with sophisticated and complex financial products, hedges and variable rate products. Prior to joining Loop Capital Markets and establishing its Atlanta office, Mr. Daniels was responsible for running the Atlanta public finance office for PNC, Morgan Stanley's Atlanta office, and Goldman Sachs's Chicago office, having begun his career with Goldman Sachs in New York. Mr. Daniels earned a bachelor's degree from the University of Southern California and a Master of Business Administration from the Wharton School of the University of Pennsylvania.

Katano Kasaine is an Assistant General Manager and Chief Financial Officer at the Metropolitan Water District of Southern California. In this capacity, she is responsible for directing Metropolitan's financial activities, including accounting and financial reporting, debt issuance and management, financial planning and strategy, managing Metropolitan's investment portfolio, budget administration, financial analysis, financial systems, and developing rates and charges. Her municipal experience spans over 26 years. In her prior role as Director of Finance/Treasurer for the City of Oakland, Ms. Kasaine managed all aspects of the City's finance functions, including the issuance and administration of all debt financings, budgets, and financial reporting. She has served on various public boards and committees, including the Oakland Joint Powers Financing Authority, the Police and Fire Retirement System and the Deferred Compensation Committee. Ms. Kasaine earned a bachelor's degree in business administration from Dominican University and a master's degree in public health from Loma Linda University.

Liz Sweeney is President and founder of Nutshell Associates, LLC, a Maryland-based municipal advisory firm, where she provides public finance expertise, debt advisory, and analytical tools and data to lenders, investors, and borrowers to improve access to capital and informed business decisions. Ms. Sweeney also serves on the board of directors of the University of Maryland Medical System. In addition, as a member of the Standard Government Reporting Working Group, she provides subject-matter expertise and market education in support of the development and adoption of machine-readable data standards for municipal and nonprofit disclosure. She began her career as a rating analyst with S&P Global Ratings, ultimately leading credit policy and risk management initiatives as Managing Director and Criteria Officer. She earned a bachelor's degree in finance from Georgetown University and a Master of Business Administration from NYU Stern School of Business.

Date: August 4, 2021

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SIFMA Joint Trades Letter on the Adjustable Interest Rate (LIBOR) Act.

SUMMARY

SIFMA and joint trade associations provided comments to the Committee on Financial Services and Subcommittee on Investor Protection, Entrepreneurship and Capital Markets in support of the Adjustable Interest Rate (LIBOR) Act to address "tough legacy" contracts that currently reference LIBOR.

Read the Comment Letter.

SIFMA Supports Legislation Addressing Transition Away from LIBOR.

Washington, D.C., July 28, 2021 – SIFMA sent a letter to House Financial Services Committee Chairwoman Maxine Waters (D-CA) and Ranking Member Patrick McHenry (R-NC) expressing support for the Committee passing H.R. 4616, the Adjustable Interest Rate (LIBOR) Act, sponsored by Representative Brad Sherman (D-CA). SIFMA also looks forward to working with Congress on the legislation as the process goes forward.

"SIFMA supports H.R. 4616 because it addresses the variety of issues associated with the cessation of all tenors of U.S. dollar LIBOR and facilitates a smooth transition to alternative reference rates," said SIFMA president and CEO Kenneth E. Bentsen, Jr. "As a result of the discontinuation of LIBOR, trillions of dollars of contracts, securities, and loans that use LIBOR but lack adequate fallback language will be left outstanding. One specific subset, commonly referred to as 'tough legacy' contracts, has no clear path to amendment, thereby posing a significant risk to the financial system and the underlying borrowers and consumers, investors, and banks if such legislation is not passed. We thank Chair Waters, Chairman Sherman and members of the Committee for their work on this bill."

The letter further notes, "While the Alternative Reference Rates Committee (ARRC) has successfully developed language that was recently implemented in New York and Alabama, a variety of inconsistent, or non-existent, state legislation cannot provide the benefits of a uniform Federal law, including contract certainty, fairness and equality of outcomes, avoidance of years of litigation, and market liquidity. Such a patchwork could compromise the very intent to provide a smooth transition. The legislation would change the reference rate on certain financial contracts which reference LIBOR to the Secured Overnight Financing Rate (SOFR), or an appropriately adjusted form of SOFR. This will allow the contracts to continue to function as originally intended after LIBOR is discontinued, without the need to be amended or subject to litigation."

SIFMA also joined several other trade associations in sending a letter to Chairwoman Waters, Ranking Member McHenry, and Representatives Sherman and Huizenga which expresses broad industry support for H.R. 4616.

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MSRB Issues Guidance on Primary Offering Disclosure Form.

The MSRB issued a new FAQ to clarify the process for completing the MSRB's primary offering

disclosure form (i.e., Form G-32).

In the FAQ, the MSRB explains that:

- Blue Sky restrictions are not required to be identified as a Restriction on Issue;
- contractual restrictions on the sale, resale, or transfer of securities must be identified as a Restriction on Issue;
- an underwriter should provide the name of a deal participant who is acting in the role of a municipal advisor, even where a municipal advisor is identified by another term;
- the underwriter should identify municipal securities as having a credit enhancement when the form of credit enhancement does not fall into the categories of “letter of credit” or “bond insuranc e”;
- Form G-32 allows an underwriter to indicate that obligated person(s) for municipal securities are determined by objective criteria and may change; and
- underwriters are required to complete Form G-32 for municipal securities that are not eligible for the New Issue Information Dissemination Service.

Cadwalader Wickersham & Taft LLP

July 27 2021

Frequently Asked Questions About MSRB Form G-32.

The MSRB is providing the following set of responses to frequently asked questions (FAQs) to enhance understanding of the process for completing Form G-32.

These FAQs do not create new legal or regulatory requirements or new interpretations of existing requirements and should not be interpreted by regulated entities or examining authorities as establishing new standards of conduct. This resource has not been filed with the Securities and Exchange Commission (SEC) and has not been approved nor disapproved by the SEC. Regulated entities, examining authorities, and others should not interpret this resource as establishing new or additional obligations for any person.

This resource should be read in conjunction with MSRB Rule G-32 and all related rules and interpretations. The full text of MSRB rules and interpretations can be found at https://msrb.org/Rules-and-Interpretations/MSRB-Rules.

1. Restrictions on Issue

Form G-32 requires information regarding when a subsequent “sale, resale, or transfer” of a municipal security is subject to certain qualifying terms or conditions (a “Restriction on Issue”). An example of a Restriction on Issue could be that a sale, resale, or transfer of a municipal security is contingent on a prospective purchaser meeting a requisite level of sophistication, as may be evidenced by investor affirmations about the investor’s knowledge, experience, and capability to evaluate the merits and risks of the prospective purchase (e.g., similar or analogous affirmations as those of a ‘Qualified Institution Buyer’).

1.1 Would the state-by-state restrictions on the sale of certain municipal securities commonly referred to as “State Blue Sky Restrictions” need to be

identified on Form G-32's field regarding *Restriction on Issue*?"
No, State Blue Sky Restrictions do not need to be identified on Form G-32 as a *Restriction on Issue*.

1.2 Would the contractual restrictions on the sale, resale, or transfer of municipal securities that are typically incorporated into the transactional documents (e.g., on the bond certificate itself and/or in the bond indenture or trust agreement) need to be identified on Form G-32 in the *Restrictions on Issue* field?
Yes, Form G-32 is intended to capture these types of contractual restrictions on the sale, resale, or transfer of municipal securities. Underwriters who believe the *Restrictions on Issue* field is applicable should check the box to indicate yes, there are such contractual restrictions, as for example, in a primary offering structured to meet the exemption requirements of Rule 15c2-12(d)(1)(i) for purchase by thirty-five investors or less (as further described therein).

2. Additional Syndicate Managers

Form G-32 requires information regarding each of the other co-managers in a syndicate.

2.1 Who should be identified as a co-manager?
For purposes of the *Additional Syndicate Managers* field on Form G-32 and the determination of which firms should be identified as a senior manager or co-manager, an underwriter completing Form G-32 should identify all the other underwriting firms that it understands to be participating in the syndicate account's offering, sale, and distribution, such as, for example, those firms acting as underwriters and listed in a final pricing wire and/or by the issuer in a final official statement.

2.2 Must the underwriter identify selling group members?
No, for purposes of the *Additional Syndicate Managers* field on Form G-32, the MSRB does not expect an underwriter to identify selling group members.

3. Name of Municipal Advisor

Form G-32 requires information regarding the name of each municipal advisor.

3.1 If a municipal advisor firm is described in the issuer's official statement as a "financial advisor" should an underwriter provide the name of that firm as a municipal advisor in Form G-32?
Yes, an underwriter completing Form G-32 should provide the name of a deal participant who the underwriter understands to be acting in the role of a municipal advisor, even in instances where a municipal advisor may be identified by a different term, such as financial advisor, in an official statement or offering memorandum.

4. Credit Enhancers and LEIs

Form G-32 requires information regarding the legal entity identify or "LEI" for credit enhancers when such LEI is readily available.

4.1 For purposes of Form G-32, should the underwriter identify the municipal securities as having a credit enhancement when the form of credit enhancement does not fall into the category of a letter of credit nor bond insurance?
Yes, the *Credit Enhancement* section on Form G-32 indicates whether the municipal securities have a form of credit enhancement. In situations where the form of credit enhancement does not fall into the categories of "letter of credit" or "bond insurance," the underwriter can select the "other" option. An underwriter should select the "other" category when the offering includes a different form of credit enhancement. For example, state intercept programs,1 other guarantees (like a state guarantee), federal or state agency guarantees,2 and/or standby bond purchase agreements should be identified as " other."

4.2 Must the underwriter attempt to provide the LEI when a municipal entity, federal agency, or other similar public entity is the entity providing credit enhancement?
Yes, an underwriter should input LEI information for credit enhancers into the *Credit Enhancement* section of Form G-32 when such information is "readily available," in other words, easily obtainable via a general search on the internet. The underwriter should attempt to provide an LEI for entities providing a credit enhancement that falls into the " other" category (such as those credit enhancements described in the response to frequently asked question 4.1).

5. Obligated Persons and LEIs

Form G-32 requires information regarding the LEI for obligated persons (other than the issuer of the municipal securities) when such LEI is readily available.

5.1 Does Form G-32 allow for situations where obligated persons are subject to objective criteria and may change?
Yes, the *Obligated Persons* section of Form G-32 allows an underwriter to indicate that the obligated person(s) for the municipal securities are determined by objective criteria and may not be known at the time of issuance or may subsequently change in the future, such as in the case of certain pooled financings. Instances when an underwriter understands that obligated persons are subject to objective criteria (and so may change), and the official statement identifies the obligated person(s) who initially meet the stated objective criteria, then the underwriter should identify such obligated person(s) and indicate that the municipal securities are subject to objective criteria. Instances when an underwriter understands that obligated persons are subject to objective criteria (and so may change), but the official statement does not identify any such obligated persons, the underwriter need only indicate that the municipal securities are subject to objective criteria.

6. Private Placements

An underwriter must submit information about private placements on Form G-32, including when the municipal securities are not eligible for the New Issue Information Dissemination Service ("Non-NIIDS-Eligible Offerings").

6.1 Are underwriters required to complete Form G-32 for Non-NIIDS-Eligible

Offerings, like certain private placements?
Yes, underwriters are required to complete Form G-32 for Non-NIIDS-Eligible Offerings, like certain private placements. Effective as of August 2, 2021, for a Non-NIIDS-Eligible Offering, an underwriter would continue to be required to manually complete the same data fields that it currently completes on Form G-32, with the addition of three new data fields regarding: (i) the original minimum denomination, (ii) whether the original minimum denomination of the offering could change, and (iii) whether there is a Restriction on Issue. For purposes of Form G-32, the term "underwriter," as defined by reference in Rule G-32 to SEC Rule 15c2-12, encompasses certain dealers acting as agents in the private placements of municipal securities. See File No. SR-MSRB-2020-08 (Oct. 13, 2020), at note 12 .

7. Submission Timing

Rule G-32's submission requirements depend on whether the new issuance is a *NIIDS-Eligible Primary Offering or a Non-NIIDS-Eligible Primary Offering*. See Rule G-32(b)(i)(A)(1) and Rule G- 32 (b)(i)(A)(2), respectively. For *NIIDS-Eligible Offerings,* the information auto-populated into Form G-32 is sourced from information submitted by an underwriter to NIIDS pursuant to MSRB Rule G-34 (which governs the content and timing of submissions to NIIDS to facilitate the timely reporting, comparison, confirmation, and settlement of transactions in a new issue). See Rule G-34(a)(ii).

7.1 For advance refundings, when must the CUSIP(s) and dollar amount(s) of the refunded securities be submitted on Form G-32?
In a primary offering generating proceeds to advance refund previously issued municipal securities (i.e., "Advance Refunded Bonds"), Form G-32 requires information regarding the dollar amount of each of the Advance Refunded Bonds being advance refunded and CUSIP information for those Advance Refunded Bonds (when applicable). This information must be submitted on Form G-32 at the earlier of either (i) the date of official statement submission or (ii) the closing date. *(Added July 30, 2021)*

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1. The MSRB understands that it is common for municipal securities issued by school districts to include a credit enhancement mechanism by which public funds in support of school district activities are redirected to satisfy debt service shortfalls.

2. The MSRB understands that it is common for municipal securities issued by housing agencies to incorporate certain guarantees or insurance provided by other federal and/or state agencies, like Ginnie Mae, Fannie Mae, or Freddie Mac.

House Financial Services Committee July 2021 Markup: SIFMA Comment Letter

SUMMARY

SIFMA respectfully submits this letter to the House Financial Services Committee in connection with its full committee markup on July 28, 2021. Included are SIFMA's views on H.R. 4616, the

Adjustable Interest Rate (LIBOR) Act; H.R. 4617, to require the Securities and Exchange Commission to carry out a study on payment for order flow; H.R. 4618, the Short Sale Transparency and Market Fairness Act; H.R. 4619, to amend the Securities Exchange Act of 1934 to prohibit trading ahead by market makers, and for other purposes; H.R. 935, the Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act; and H.R. 2265, the Financial Exploitation Prevention Act.

Read the Comment Letter.

GASB Issues Proposal to Enhance Concepts for Notes to Financial Statements.

Norwalk, CT, July 20, 2021 — The Governmental Accounting Standards Board (GASB) today issued a proposed Concepts Statement to guide the Board when establishing note disclosure requirements for state and local governments. The document is part of the GASB's response to the results of its research reexamining existing note disclosure requirements.

The proposed concepts primarily are intended to provide the GASB with criteria to consistently evaluate notes to financial statements in the standards-setting process. They also may help stakeholders to understand the fundamental concepts underlying future GASB pronouncements.

The Revised Exposure Draft (RED), *Communication Methods in General Purpose External Financial Reports That Contain Basic Financial Statements: Notes to Financial Statements*, proposes concepts such as:

- The purpose of notes to financial statements
- The intended users of note disclosures
- The types of information that should be disclosed in notes
- The types of information that are not appropriate for note disclosures.

A key element of the proposed Concepts Statement is the concept of essentiality. The RED would establish that notes to financial statements are essential to making economic, social, or political decisions or assessing accountability. The RED also identifies the characteristics that indicate information is essential to users:

- Users utilize the information in their analyses for making decisions or assessing accountability or would modify those analyses to incorporate the information if it were made available.
- The information has or would have a meaningful effect on users' analyses for making decisions or assessing accountability.
- A breadth or depth of users utilize or would utilize the information in their analyses for making decisions or assessing accountability.

The GASB issued an Exposure Draft (ED) on this topic in early 2020. The Board has issued this RED to incorporate feedback received from stakeholders on the previous ED and to seek feedback on the resulting proposed revisions, which the Board believes will improve the final concepts.

The Revised Exposure Draft is available for download at no charge on the GASB website, www.gasb.org. Stakeholders are encouraged to review and provide comments by October 15, 2021.

GASB Proposes Omnibus Statement Addressing Wide Range of Practice Issues.

Norwalk, CT, July 19, 2021 — The Governmental Accounting Standards Board (GASB) has proposed guidance addressing various accounting and financial reporting issues identified during the implementation and application of certain GASB pronouncements or during the due process on other pronouncements.

The issues covered by the Exposure Draft, *Omnibus 20xx*, include:

- Accounting and financial reporting for exchange or exchange-like financial guarantees
- Classification and reporting of certain derivative instruments that are neither hedging derivative instruments nor investment derivative instruments
- Clarification of certain provisions of:
- Statement No. 87, *Leases*
- Statement No. 94, *Public-Private and Public-Public Partnerships and Availability Payment Arrangements*
- Statement No. 96, *Subscription-Based Information Technology Arrangements*
- Extending the period during which the London Interbank Offered Rate (LIBOR) is considered an appropriate benchmark interest rate for the qualitative evaluation of the effectiveness of certain interest rate swaps
- Accounting for the distribution of benefits as part of the Supplemental Nutrition Assistance Program (SNAP)
- Disclosures related to nonmonetary transactions
- Pledges of future revenues when resources are not received by the pledging government
- Updating certain terminology for consistency with existing authoritative standards.

The Exposure Draft is available on the GASB website, www.gasb.org. The GASB invites stakeholders to review the proposal and provide comments by September 17, 2021.

07/19/21

MSRB Holds Quarterly Board Meeting and Elects New Officers.

Washington, DC – The municipal market's self-regulatory organization held its quarterly Board of Directors meeting in Washington, DC, on July 21-22, 2021. The Municipal Securities Rulemaking Board (MSRB) elected new officers and adopted a new organizational vision, long-term strategic direction and supporting budget for Fiscal Year 2022 that will advance its mission in the upcoming fiscal year and beyond.

Also at its meeting, the Board considered and advanced several market regulation initiatives, received updates on multi-year technology and data activities, and authorized staff to prepare a request for information on Environmental, Social and Governance (ESG) considerations in the municipal market.

Board Leadership

The Board announced today that it has elected Patrick Brett, Managing Director and Head of

Municipal Debt Capital Markets at Citi in New York, to serve as FY 2022 Chair of the Board. Meredith L. Hathorn, Managing Partner, Foley & Judell, L.L.P. in Baton Rouge, LA, will serve as Vice Chair. Officer terms are one year. The Board will soon announce the incoming class of four new Board members whose terms will begin October 1, 2021.

“Both Patrick and Meredith exemplify the commitment to public service and market knowledge that are hallmarks of great Board leaders,” said MSRB CEO Mark Kim. “I am delighted to be working alongside Patrick and Meredith to advance the MSRB’s bold new strategic plan grounded in our Congressional mandate to protect investors, issuers and the public interest.”

Strategic Planning

The Board defined the MSRB’s mission, vision and values and adopted a long-term strategic plan aimed at strengthening market efficiency and transparency. The MSRB will publish its strategic plan for the next four years in advance of the new fiscal year, which begins on October 1, 2021.

“We spent the last year listening to our stakeholders and formulating the Board’s vision for the market that helps bring progress and opportunity to communities across the country,” Kim said. “I’m looking forward to continuing that dialogue and sharing our strategy for how we can deploy the tools of regulation, technology and data in impactful ways to serve the public interest.”

Market Regulation

The Board advanced the following initiatives through the rulemaking process:

- **Filing proposed amendments to MSRB Rule G-10:** After considering comments received during its public request for comment, the Board determined to seek approval from the Securities and Exchange Commission (SEC) of a proposed rule change to streamline the delivery of disclosures to investors and to amend Rule G-48 to exempt sophisticated municipal market professionals (SMMPs) from the disclosure requirement.
- **Filing proposed modernization of MSRB Rule G-34:** Based on stakeholder feedback, the Board authorized staff to seek SEC approval of proposed amendments to align the text of the MSRB’s rule on obtaining CUSIP numbers with current market practices.
- **Additional comment on draft solicitor municipal advisor rule:** The Board discussed comments received on a public request for comment on draft MSRB Rule G-46 and determined to publish a second request for comment on a revised draft rule addressing feedback from commenters.
- **Filing proposed amendments on the application of Regulation Best Interest:** The MSRB will seek SEC approval of proposed amendments to MSRB rules to apply aspects of the SEC’s Regulation Best Interest requirements to bank dealers. The MSRB also will seek approval to amend Rule G-48 to address changes to the responsibility to perform a quantitative suitability analysis when making a recommendation to certain SMMPs.

The MSRB plans to advance these rulemaking initiatives over the next several months. Previously, the Board authorized staff to issue a request for comment on next steps in modernizing MSRB Rule G-27 on dealer supervision, which the MSRB plans to do later this summer for a 90-day comment period.

Professional Qualifications and Compliance

The Board received an update on the implementation of the Series 54 examination for municipal advisor principals. Municipal advisor principals must take and pass the exam by November 12, 2021.

On November 13, 2021, issuers and the public may view a listing of individuals who have become qualified with the Series 54 exam. View the MSRB's Series 54 resource page.

The Board also discussed the development of compliance resources for dealers and municipal advisors. The Board's FY 2021 Compliance Advisory Group helps identify those areas where compliance assistance is warranted and will be most impactful.

Technology and Data

The Board continues to monitor efforts to leverage cloud technology to modernize the MSRB's critical market transparency systems, including the Electronic Municipal Market Access (EMMA®) website. The Board also previewed a prototype data quality dashboard that is being developed to enhance the MSRB's data governance and oversight capabilities.

"As our market becomes increasingly data-driven, we recognize that enhancing data quality will significantly enhance the ability of market participants to make informed decisions," Kim said.

ESG Initiatives in the Municipal Market

The Board continues to discuss how ESG considerations are influencing market practices and has authorized staff to prepare a draft request for information from the public. The request for information would be intended to inform the MSRB's understanding of this evolving area in the market and how the MSRB might approach ESG trends in the context of its mission to protect investors, municipal issuers, and the public interest.

MSRB Budget and Operations

The Board approved a $43 million operating budget for FY 2022, reflecting a 4% increase over FY 2021. The Board also approved designating an additional $7.5 million of organizational reserves to increase the Board's Designated Systems Modernization Fund, bringing the total level of funding for this multi-year effort to $17.5 million to modernize the MSRB's suite of market transparency technology systems. The full budget will be published this fall.

The MSRB today is announcing that it has named Omer Ahmed as Chief Financial Officer to oversee the budget and financial stewardship of the organization. Ahmed previously served as Chief Risk Officer. Nanette Lawson, who has been serving in the dual capacity of Chief Operating Officer and CFO, will focus exclusively on COO responsibilities, including management of the MSRB's regulatory, technology and data divisions as well as finance, risk, human resources and administration.

More information regarding the Board's governance, membership, and Committees and advisory groups is available at https://www.msrb.org/About-MSRB/Governance/MSRB-Board-of-Directors.

Date: July 23, 2021

Contact: Leah Szarek, Chief External Relations Officer
202-838-1300
lszarek@msrb.org

SECF Fines UBS $10m Over Alleged Adviser 'Misdirection' of Investments.

The US Securities and Exchange Commission today (20 July) fined UBS Financial Services Inc more than $10m over charges that its financial advisers misdirected certain exchange-traded products to retail investors.

According to the SEC's order, over a four-year period, UBS improperly allocated bonds intended for retail customers to parties known in the industry as "flippers," who then immediately resold or "flipped" the bonds to other broker-dealers at a profit.

The order found that UBS registered representatives knew or should have known that flippers were not eligible for retail priority.

In addition, the order finds that UBS registered representatives facilitated over 2,000 trades with flippers, which allowed UBS to obtain bonds for its own inventory, thereby circumventing the priority of orders set by the issuers and improperly obtaining a higher priority in the bond allocation process.

"Retail order periods are intended to prioritize retail investors' access to municipal bonds and we will continue to pursue violations that undermine this priority," said LeeAnn G. Gaunt, chief of the Division of Enforcement's Public Finance Abuse Unit.

The SEC previously brought charges of municipal bond offering "flipping" and retail order period abuses in August 2018, in December 2018, in September 2019, and in April 2020.

Without admitting or denying the findings, UBS consented to a cease-and-desist order that finds it violated the disclosure, fair dealing, and supervisory provisions of Municipal Securities Rulemaking Board Rules G-11(k), G-17, and G-27, and also failed reasonably to supervise within the meaning of Section 15(b)(4)(E) of the Securities Exchange Act of 1934.

The order imposed a $1.75m penalty, $6.74m in disgorgement of ill-gotten gains plus over $1.5m in prejudgment interest, and a censure.

In related actions, the SEC instituted settled proceedings today against UBS registered representatives William S. Costas and John J. Marvin.

The SEC's order found that Costas and Marvin negligently submitted retail orders for municipal bonds on behalf of their flipper customers and that Costas also helped UBS bond traders improperly obtain bonds for UBS's own inventory through his flipper customer.

internationalinvestment.net

by Mark Battersby

July 2021

Economists Find Underreporting of Municipalities' Private Debt Obligations.

The underreporting of bank debt remains a sizable risk for holders of municipal bonds two years after Securities and Exchange Commission rule changes designed to improve transparency.

That was the conclusion of scholarly research performed by three economists and presented Monday at the Brookings Municipal Finance Conference. The paper authored by Federal Reserve Board

economists Ivan Ivanov and Nathan Heinrich, as well as by Tom Zimmermann of the University of Cologne, examined the effectiveness of regulations designed to improve the transparency of private debt and concluded the requirements have limited effectiveness.

“We need to worry about it,” Ivanov said during a webcast presentation of the research. “We need to be able as a market to observe these.”

Roughly 50% of issuers are now required to disclose private debt under the 2019 amendments to the SEC?s Rule 15c2-12, the researchers found. Those rules require disclosure of the incurrence of a financial obligation of the issuer or obligated person, if material, as well as any agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the issuer or obligated person, if these are material.

Bond investors need to be aware of other obligations because such debts could potentially impair bondholders, particularly if the debt is explicitly senior to the outstanding bonds.

The authors used subscription services and confidential data, and also hand-collected information from over 2,300 filing documents. In each filing, they searched for the obligation amount, interest rate and maturity, noting whether the filing was new or amending an existing obligation, and whether the filing included a term sheet summarizing the obligation.

The authors found that private debt was significantly underreported, using their data to determine when a filing was required and whether an associated disclosure appeared on EMMA.

“In the vast majority of bank loan events where disclosure is required, the associated issuer makes no disclosure on the EMMA system,” the researchers discovered. “For example, out of the 4,813 such bank loan events, only 935 events corresponding to 156 entities are associated with mandatory disclosures filings on the EMMA system.”

Further, the authors found, there was a wide range in the quality of these disclosures, with most offering up the size of the obligation but many excluding important information about the terms of such obligations.

The economists suggested that low issuer sophistication and familiarity with 15c2-12 might partly explain the underreporting.

Emily Brock, the director of the federal liaison center at the Government Finance Officers Association also noted during the conference that some issuers might not be aware of the rule. Brock said there is an opportunity for the whole muni market to improve the state of disclosure.

“We can use this opportunity to see what EMMA can be,” Brock said.

She also said it’s important to note that issuers lean heavily on counsel to help them make the determination about materiality, a concept that can be difficult to pin down. The SEC has generally declined to elaborate on when an obligation or event is material, not wanting to go beyond the Supreme Court?s ruling that something is material if there is “a substantial likelihood” that the disclosure would have been viewed by a “reasonable investor” as having significantly altered the “total mix of information” used to make an investment decision.

The Brookings conference continues through Wednesday.

By Kyle Glazier

BY SOURCEMEDIA | MUNICIPAL | 07/13/21 01:18 PM EDT

Why There's Rising Interest in Giving More Updates to Bondholders.

Investors and others would like to see more timely information about developments with municipal borrowers' finances. "Voluntary disclosure" can help, experts say.

When state and local governments borrow through the municipal bond market to pay for road construction, waterworks upgrades or other projects, they take on obligations to report information about their finances to investors until the debt is paid off.

But issuers often don't release annual financial statements they're required to disclose until well after their fiscal year ends, making it hard to get an up to date picture about what's happening with their finances. This gap between budget cycles and these disclosure filings can stretch six or even nine months and some investors and others think the delay is too long.

Beyond the annual financial reports, under Securities and Exchange Commission rules, borrowers also have to publicly file ongoing notices about certain events, like delinquent payments, unscheduled draws on debt service reserves, or credit ratings changes.

In recent years, there's been growing interest in what's known as "voluntary disclosure," where state and local governments proactively release information related to their finances and relevant for investors, even though they are under no obligation to do so.

"Voluntary disclosure is taking it a step further and truly is what it sounds like. It's voluntary," said David Erdman, Wisconsin's capital finance director, during a Government Finance Officers Association conference taking place online through next week.

Erdman pointed out that after a state or local government finishes issuing bonds and the proceeds are in-hand and construction is underway on a project, it can feel as though the deal is done. But until the bonds are paid off, that's not really the case.

While the bonds are still outstanding, investors might be looking to assess the value of the debt, or to sell it on the "secondary market." But infrequent financial disclosures by governments mean the official information they have to make decisions can be incomplete or scarce.

Erdman likens the situation here to someone trying to buy a used car, who can only find information about the vehicle that's a year or more old. "You wouldn't know what the current miles are, you wouldn't know if there's any recent accidents," he said.

"Same thing goes with a municipal bond," Erdman added, "more information needs to be out there and that's where voluntary information kicks in."

A good example of when disclosures to investors like this can make sense is the Covid-19 pandemic, which stirred historic uncertainty about state and local governments' finances, the expenses they were taking on to respond to the crisis, and how it was affecting revenues.

There are other situations as well. For instance, a cyberattack, or a natural disaster like a flood or hurricane, might be the kind of event that investors want more details about to have a better understanding of how it's affecting a bond issuer's finances.

GFOA points out that going beyond disclosure requirements can be a part of investor relations programs and is one measure that state and local bond issuers can take to promote efficiency in the municipal bond market and to improve how their debt sales are received.

“In today’s municipal market there is a heightened focus on the quality and transparency of disclosure practices by issuers,” GFOA notes.

Presenting information in context

Jacquelynne Jennings, a partner at the law firm Schiff Hardin LLP (emphasizing she was speaking for herself and not the company) said that the SEC has shown an interest in greater financial disclosures by municipal borrowers.

“They would like for municipalities to more mirror the corporate markets and provide information quarterly, which is not going to happen, but at least more frequently than annually,” she said.

Erdman said he’s concerned that if municipalities and others don’t ramp up disclosure efforts, the SEC might push additional regulations on the muni market—possibly to a degree that some issuers might turn to bank loans rather than bonds to meet their capital needs.

That said, for governments that only sell bonds every few years, voluntary disclosures may not be worth the effort. “The state of Wisconsin is a large, frequent issuer and there’s probably some investor relations benefit for us doing this,” Erdman said.

But even for medium size issuers, who are issuing bonds on an annual basis, he added, providing voluntary information to the market on a regular basis can have benefits.

Also, voluntary disclosure doesn’t have to just be for bad news. It can highlight notable developments that have to do with things like revenue growth or infusions of federal funds.

Another area where voluntary disclosure can make sense is around issues that have to do with environmental, social and governance, or ESG, criteria. GFOA describes these factors as areas that can affect a community’s long-term sustainability. Examples include things like exposure to climate risks, demographic changes, or pension liabilities.

“ESG is all the rage right now in the market,” said Timothy Ewell, chief assistant county administrator for Contra Costa County, California. “In California, wildfires are the thing now.” He noted that a GFOA’s committee is working to assemble best practices and templates that jurisdictions can use to disclose ESG information to the bond market.

Jennings discussed how if finance officials fall short sharing timely information with bond market participants, investors may look elsewhere to assess what’s going on and that could mean turning to statements by politicians or press reports that don’t give a full picture.

“A lot of times doing this voluntary disclosure is the best chance that you have,” she said, “to present the facts in their proper context.”

ROUTE FIFTY

by BILL LUCIA

JULY 15, 2021

Insurance Commissioner, Acting as Liquidator of RRG, Is Not a "Governmental Authority."

When is an insurance commissioner not a governmental authority? A federal district judge reminds us that a state insurance commissioner, when acting as receiver of an insolvent insurer, acts in a different capacity to his governmental role. This principle can cause an insurance commissioner to fall outside a contractual definition of "governmental authority" even where the definition contains inclusive language on multiple capacities.

In a decision handed down on June 21, 2021, in *Trinidad Navarro, Insurance Commissioner of Delaware v. Allied World Surplus Lines Insurance Company*, Judge Kari A. Dooley of the U.S. District Court for Connecticut held that a claim made by Commissioner Navarro as liquidator of a risk retention group (RRG) was not a "governmental claim" within the meaning of an insurance policy. According to the court, the commissioner was acting as a "private receiver" for the insurer's benefit. (The court did not distinguish between an RRG and an insurer.) Assuming it is not reversed or overturned, the decision could provide new guidance to future litigants in disputes over the nature and scope of insurance receiverships.

Carrier Solutions Risk Retention Group, Inc. (CSRRG) was a Delaware-domiciled RRG managed by service provider USA Risk Group (West) Inc. (USA Risk). In 2010, facing insolvency, CSRRG was placed in liquidation proceedings by Delaware chancery court in accordance with Delaware's statutory insurance insolvency scheme, with the then-Delaware commissioner appointed as liquidator. (Navarro became commissioner after his 2016 election.)

USA Risk was insured against professional liability risks under an Allied World Surplus Lines Insurance Company (Allied World) policy. The policy imposed distinct limits of liability for ordinary " claims" against USA Risk on the one hand, and "governmental claims" on the other, defined as a claim or investigation (in pertinent part) "brought by any federal, state or municipal agency, insurance department or other governmental or quasi-governmental authority, in any capacity, whether in its own right, on behalf of an individual or entity, or by an individual or entity on the agency's or authority's behalf."

In May 2012, the Delaware commissioner as receiver sued USA Risk alleging that USA Risk had caused or contributed to CSRRG's insolvency. USA Risk submitted a claim to Allied World under the professional liability policy. After bearing USA Risk's litigation expenses for about three years in the case brought by the receiver, around July 2015 Allied World withdrew its defense and contended that it had satisfied its $25,000 limit of liability applicable to "governmental claims." In response, the receiver took the position that his claim was not a "governmental claim" and thus eligible for the policy's more generous policy limit of $3,000,000.

CSRRG and USA Risk settled their litigation for $1,000,000. CSRRG thereupon, as USA Risk's assignee, sued Allied World in federal district court in Connecticut, where Allied World (and a predecessor insurer that had issued the policy initially) had administrative offices. CSRRG sought to recover damages arising from Allied World's failure to continue its defense of the claim after around July 2015. Allied World moved to dismiss the case on the grounds that the receiver's claim against USA Risk constituted a "governmental claim" under the Allied World policy and that, therefore, Allied World was liable for no more than $25,000.

Allied World argued that the insurance commissioner is a governmental authority and therefore, CSRRG's claim against Allied World categorically is a "governmental claim." The commissioner, in

turn, argued that he was acting not in his capacity as government official but rather as a "private receiver" on behalf of CSRRG. (The commissioner also argued in the alternative that, even if the claim would otherwise be classified as a governmental claim, an exclusion in the definition, for claims by a governmental authority in its role as a customer, would not apply. The court explained that it did not need to reach this question because it was holding that the "governmental claim" definition was unavailing in the first place.)

According to the court, the law of Vermont (where the policy was issued) and the law of Connecticut would not differ on the interpretive question before it. Therefore the court found it unnecessary to specify which state's law governed. (The court also analyzed Delaware case law in its opinion, without stating expressly that Delaware law controlled.) While noting possible ambiguity in the policy's definition of "governmental claim," the court explained that neither the commissioner nor Allied World was arguing that the policy language was ambiguous. The court would make an interpretive ruling based solely on the language itself.

Judge Dooley explained that she found the commissioner's position (that he is not a governmental authority in this instance) "persuasive." CSRRG's liquidation order issued by the Delaware chancery court had vested in the commissioner all rights and interests in all of CSRRG's property and empowered the commissioner to act generally on behalf of CSRRG for the benefit of its members, policyholders, creditors and other stakeholders. The commissioner's action against Allied World was functionally an action by a private party, CSRRG.

The court did not cite any previous insurance policy or other contract that had been so interpreted in a judicial forum and did not invoke any other textual predicate for its decision. The court relied mainly on decisions by state courts, including Delaware courts, holding more generally or in other contexts that an insurance commissioner acts in two different capacities. For example, Judge Dooley cited a New York case in which the state insurance liquidation bureau (an arm of the insurance department) was immune from state audits of government bodies. A Pennsylvania case was cited for the proposition that a regulator's prior actions qua regulator could not be asserted against her as an affirmative defense in an action brought by her as receiver. A Kentucky court had held that the commissioner as receiver fell outside the state's open public records act.

The court rejected the commissioner's argument concerning the allegedly plain language of the policy ("any . . . governmental or quasi-governmental authority, in any capacity. . . ." (emphasis added)) and the commissioner's exclusive role as receiver. In other words, the commissioner was contending that he is the only official authorized by law to act as receiver, and therefore the policy's use of the term "in any capacity" must capture this role. The court held that, on the contrary, the term "governmental claim" must exclude the receiver's capacity. The court did not explain its specific basis for construing "in any capacity" to mean, in essence, something less than all possible capacities.

Whether *Navarro* will change how insurance receivers are perceived by the courts in contractual situations involving terms such as "governmental authority" remains to be seen. For the time being, it does seem as though Judge Dooley has broken at least some new ground in explaining that an insurance policy's definition of "governmental claim," even where referring to any capacity of a governmental body, must categorically exclude a commissioner's statutory and exclusive role as a receiver.

Kramer Levin Naftalis & Frankel LLP – Daniel A. Rabinowitz

July 15 2021

Broker-Dealer Settles FINRA Charges for Systemic Supervisory Failures.

A broker-dealer settled FINRA charges for systemic failures, including failing to establish (i) a reasonable supervisory system for its mutual fund and municipal bond businesses, and (ii) a reasonable system of supervisory controls to verify its surveillance systems.

In a Letter of Acceptance, Waiver and Consent, FINRA found that the firm's automated surveillance system, which identified and flagged for review Class A Share switches, did not provide the critical data needed to evaluate the suitability of a transaction, such as the holding periods of the Class A Shares. FINRA found that the firm allowed its supervisors to clear alerts that were missing information significant to a suitability determination after obtaining an explanation from the registered representative but without further investigation.

FINRA also found that the firm (i) did not address suitability reviews specific to municipal bonds in its written supervisory procedures and (ii) failed to conduct a heightened review of a broker's short-term trading of Puerto Rican municipal bonds, which carried additional risks due to the restructuring of Puerto Rican debt. As a result, the firm violated FINRA Rule 3110 ("Supervision") and MSRB Rules G-27(b) and (c).

With regard to supervisory controls, FINRA stated, the firm's annual tests did not examine whether the system for supervising two active business lines (mutual funds and municipal bonds) was reasonably designed to achieve compliance with FINRA and MSRB suitability rules, in violation of FINRA Rule 3120 ("Supervisory Control System") and MSRB Rule G-27(f).

The above-mentioned conduct is also a violation of FINRA Rule 2010 ("Standards of Commercial Honor and Principles of Trade").

To settle the charges, the firm agreed to (i) a censure, (ii) a $750,000 fine (including $225,000 for the MSRB Rule G-27 violations) and (iii) an undertaking to certify the implemented supervisory systems.

Cadwalader Wickersham & Taft LLP

July 14 2021

Municipal Advisor Principal Qualification Exam: MSRB Reminder

Municipal advisor firms must ensure their municipal advisor principals are properly qualified.

The November 12, 2021 compliance deadline to take and pass the Municipal Advisor Principal Qualification (Series 54) Exam is approaching.

Learn more.

National Public Finance Guarantee Corporation, et al. v. UBS Financial

Services Inc., et al: SIFMA Amicus Brief

Court:
Puerto Rico Appeals Court

Amicus Issue:
Whether plaintiffs claim that they reasonably relied upon the due diligence conducted by underwriters, where underwriters included standard industry disclaimers to the effect that underwriters do not guarantee the accuracy or completeness of the information in the offering documents, can survive a motion to dismiss.

Counsel of Record:
Orrick, Herrington & Sutcliffe LLP

- Richard A. Jacobsen
- Daniel A. Rubens
- Siobhan Atkins

Read the SIFMA Amicus Brief.

NFMA White Paper on Guidance & Insights Regarding Emergency Event Disclosure Affecting State & Local Governments: COVID-19 Focus

White Paper on Guidance & Insights Regarding Emergency Event Disclosure Affecting State & Local Governments: COVID-19 Focus Released

- White paper, dated June 2021
- Press release, dated July 6, 2020

Amendments to Rule G-10 Notification Requirement for Dealers: SIFMA Comments

SUMMARY

SIFMA provides comments to the Municipal Securities Rulemaking Board (MSRB) on their Notice 2021-08, proposing an amendment to MSRB Rule G-10, on investor and municipal advisory client education and protection, to clarify the requirements for brokers, dealers, and municipal securities dealers to provide the annual notifications to those customers who would be best served by receipt of the annual notifications.

Read the SIFMA comments.

BDA Supports Proposed Changes to MSRB Rule G-10

Yesterday, BDA submitted a comment letter to the MSRB on Notice 2021-08, “Request for Comment

on Amendments to Rule G-10 Notification Requirements for Dealers." MSRB last month issued the Notice and proposed to amend MSRB Rule G-10. Rule G-10 requires municipal dealers to send certain annual information disclosures to investor customers and issuer clients.

View the comment letter here.

In our January letter on MSRB strategic priorities, BDA pointed out that Rule G-10 requires municipal-related disclosures to customers who have never and may never own or trade municipal security. We requested that the MSRB amend Rule G-10 to target required disclosures to municipal securities customers. Notice 2021-08 represents the MSRB's action on this issue.

In our letter, **we support the MSRB's proposal**. We also request three additional changes to Rule G-10 to exempt issuers from these disclosures, permit clearing firms to transmit the relevant disclosures on behalf of their introducing firms' customers, and require disclosures for customers who own municipal securities or have traded them since the last annual disclosure rather than owned municipals at any time in the last year.

Bond Dealers of America

June 29, 2021

EMMA Disclosure Calendar - Continuing Disclosure Agreement

Why does the Submission Calculator on EMMA® not use the issuer's continuing disclosure agreement due date?

Learn that and more by watching our free on-demand webinar, Using EMMA to Identify Timing of Annual Financial Disclosures: msrb.org/Regulated-Entities/Webinars.aspx …#EMMAToolsTuesday

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NAIC's SAPWG Exposes Proposed Definition of "Bond" for Purposes of SSAPs 26R and 43R: Mayer Brown

On May 20, 2021, the Statutory Accounting Principles (E) Working Group (SAPWG) of the Financial Condition (E) Committee of the US National Association of Insurance Commissioners (NAIC) exposed for public comment a proposed definition of "bond" for purposes of *Statement of Statutory Accounting Principles (SSAP) No. 26R* and *SSAP No. 43R*.

Background

The proposal sets out principles for determining whether a particular investment is a "bond" that is eligible to be reported by insurance companies on Schedule D, Part 1, of their statutory financial statements. Being able to treat an investment as a "bond" has notable advantages for insurance companies, including, in most cases, significantly lower risk-based capital charges than equity investments receive and the ability for life insurers to carry the investment at amortized cost, rather than marking it to market.

The proposal is the product of many months of meetings among the SAPWG staff and

representatives of the Iowa Insurance Division (IID) and certain trade associations to expand upon the earlier conceptual proposal that the IID presented to the SAPWG last October.1 The new proposal supersedes an earlier draft issue paper developed by the SAPWG staff in March 2020, which would have administered shock therapy to the investment portfolios of life insurers, and which drew heavy criticism from the trade associations.

Perhaps significantly, the proposal foreshadows **possible** additional changes to required Schedule D reporting and states:

A separate reporting section on Schedule D, Bonds is being contemplated, for the purpose of capturing additional disclosures for regulators, for the following:

Any asset backed securities where:

1) the underlying collateral comprises cash generating non-financial assets and does not meet the practical expedient for evaluating the meaningful criteria defined in paragraph 3a and the glossary, or

2) the underlying collateral comprises financial assets that are not self-liquidating.

What Qualifies as a Bond?

The proposal defines a "bond" as any security representing a creditor relationship, whereby there is a fixed schedule for one or more future payments, and which qualifies as either an issuer credit obligation or an asset backed security (ABS). The proposal then proceeds to explain what it means by each of those two categories.

Issuer Credit Obligations

For "issuer credit obligations" the proposal states (bold italic formatting here and in the subsequent sections of this Legal Update is ours for emphasis):

An issuer credit obligation is a bond, the repayment of which is supported primarily by the general creditworthiness of an operating entity or entities. Support consists of direct or indirect recourse to an operating entity or entities, ***which includes holding companies with operating entity subsidiaries where the holding company has the ability to access the operating subsidiaries' cash flows through its ownership rights***. An operating entity may be any sort of business entity, not-for-profit organization, governmental unit, or other provider of goods or services, but not a natural person or ABS Issuer (defined below).

The proposal then provides examples of issuer credit obligations, which include, but are not limited to:

a. U.S. Treasury securities;

b. U.S. government agency securities;

c. Municipal securities issued by the municipality or supported by cash flows generated by a municipally owned asset or entity that provides goods or services (e.g., airport, toll roads etc.);

d. Corporate bonds issued by operating entities, including Yankee bonds and zero-coupon bonds;

e. Corporate bonds issued by holding companies that own operating entities;

f. Project finance bonds issued by operating entities;

g. ETCs, EETCs, and CTLs for which repayment is ***fully supported by a lease*** to an operating entity;

h. Bonds issued by REITS or similar property trusts;

i. Bonds issued by business development corporations (BDCs), closed-end funds, or similar operating entities, ***in each case registered under the 1940 Act***;

j. Convertible bonds issued by operating entities, including mandatory convertible bonds;

k. Fixed-income instruments specifically identified:

i. Certifications of deposit that have a fixed schedule of payments and a maturity date in excess of one year from the date of acquisition;

ii. Bank loans that are obligations of operating entities, issued directly by a reporting entity or acquired through a participation, syndication or assignment;

iii. Hybrid securities issued by operating entities, excluding surplus notes, subordinated debt issues which have no coupon deferral features, and traditional preferred stocks;

iv. Debt instruments in a certified capital company (CAPCO).

It is unclear how lease extension/renewal options are to be treated for purposes of the "fully supported" requirement.

Bonds issued by 1940 Act-registered BDCs and closed-end funds are included on the above list of issuer credit obligations, but not unregistered funds. We think this is due to the fact that debt securities and preferred stock issued by registered funds have long been a major investment class for life insurers, and ever since the now-superseded draft issue paper was exposed for comment in March 2020, industry representatives have strongly advocated that the treatment of this investment class as bonds be preserved. It does raise the question, however, of why 1940 Act registration is required for a fund to be considered an "operating entity." Why shouldn't an unregistered fund engaged in the same activity be treated similarly?

Asset Backed Securities (ABS)

An ABS is defined as "a bond issued by an entity (an "ABS Issuer") created for the primary purpose of raising debt capital backed by financial assets or cash generating non-financial assets owned by the ABS Issuer, whereby repayment is primarily derived from the cash flows associated with the underlying defined collateral rather than the cash flows of an operating entity." The proposal states that ABS will be a "bond" if all three of the following conditions are satisfied:

1. The investor must have a "creditor relationship" ***in substance and not just legal form. This means that if the investment relies on "equity return cash flows," it must overcome the rebuttable presumption that it is not a bond by documented analysis supporting the recharacterization of such equity risk into bond risk by structuring and diversification of collateral***.

2. The assets owned by the ABS Issuer must be ***either financial assets or cash-generating non-financial assets***—defined as assets that are expected to generate a ***"meaningful"*** level of cash flows toward repayment of the bond through use, licensing, leasing, servicing or management fees,

or other similar cash flow generation (and not just through the sale or refinancing of the assets).

3. The holder of a debt instrument issued by an ABS Issuer must be ***in a different economic position*** than if the holder owned the ABS Issuer's assets directly—as a result of ***"sufficient" credit enhancement through guarantees (or other similar forms of recourse), subordination and/or overcollateralization***.

Regarding the "creditor relationship" requirement, the proposal states:

The analysis of whether a debt instrument that relies on cash flows from underlying equity interests for repayment represents a creditor relationship in substance should be conducted and documented by a reporting entity at the time such an investment is acquired. The level of documentation and analysis required to demonstrate that the rebuttable presumption has been overcome may vary based on the characteristics of the individual debt instrument, as well as the level of third-party and/or non-insurer market validation to which the issuance has been subjected. For example, a debt instrument backed by fewer, less diversified funds would require more extensive and persuasive documented analysis than one backed with a larger number of diversified funds. ***Likewise, a debt instrument that has been successfully marketed to unrelated and/or non-insurer investors, may provide enhanced market validation of the structure compared to one held only by related party and/or insurer investors where capital relief may be the primary motivation for the securitization.***

Significantly, the proposal provides a path for collateralized fund obligations (CFOs)—which were targeted to lose bond treatment under the now-superseded March 2020 draft issue paper—to continue to be treated as bonds if they satisfy the above three criteria. Among other things, the proposal notes that in instances where the assets owned by the ABS Issuer are equity interests, the debt instrument must have pre-determined principal and interest payments (whether fixed interest or variable interest) with contractual amounts that do not vary based on the appreciation or depreciation of the equity interests.

Additional Guidance in the Proposal

The proposal includes a Glossary, explaining two of the key concepts in the ABS part of the definition: what constitutes a "meaningful" level of cash flows and what constitutes "sufficient" credit enhancement. The proposal also includes two appendices with illustrative examples.

Examples 1, 2 and 3 in Appendix I to the proposal indicate how the drafters think that the "creditor relationship" is to be analyzed. Of particular interest, example 1 describes a typical rated private equity feeder structure in which each investor (i) owns a pro rata share of the unsecured debt investments and equity interests outstanding, and (ii) is restricted from selling, assigning or transferring the unsecured debt investment without also selling, assigning, or transferring the equity interest to the same party. The drafters conclude that the debt investment does not have the required creditor relationship. It is unclear if this same result applies when the underlying fund is not "equity-like" and instead something else (e.g., private credit, real estate or infrastructure debt, etc.). Also, it would appear from the example that in a case where the debt and equity investments are not so restricted (i.e., one can be sold without the other) a different conclusion may apply.

The examples in Appendix II to the proposal provide similar indications for the contemplated determinations of "meaningful" cash flows and "sufficient" credit enhancement. Usefully, in discussing the "meaningful" cash flow requirement, the proposed definition offers a bright-line test that "a reporting entity may consider an asset for which less than 50% of the original principal relies on sale or refinancing to meet the meaningful criteria."

Issues Remaining to Be Resolved

Some issues not addressed in the proposal include:

- Treatment of synthetics (e.g., credit-linked notes)—are these permissible "issuer credit obligation s"? What if they reference asset-backed-like pools?
- Transactions like "future flow" securitizations (i.e., not primarily derived from existing financial assets but from obligations to originate additional financial assets)—e.g., stranded cost tariff bonds.
- Certain "equity" arrangements like collateral trust certificates and whole pool pass-through interests.

Conclusion

The comment period for the proposal runs until July 15, 2021. Reaction to the proposal has been generally positive but with a recognition that more work needs to be done to refine it. Eventually, the proposal will need to be developed into an issue paper, which is a prerequisite for the SAPWG to adopt substantive changes to *SSAPs No. 26R* and *43R*. Accordingly, it will be some time before the changes to the SSAPs are finalized and even longer before they go into effect. That said, the general view of the proposal is that, thanks to the collaborative efforts by NAIC staff, IID staff and industry representatives that went into drafting it, the proposal provides a framework that all parties can live with. It addresses the concerns of NAIC staff and the SAPWG that determining whether an investment is a bond should look beyond the legal form of the investment to whether, in substance, it represents a creditor relationship. Yet it does so not by "throwing the baby out with the bath water" but in a principled and careful way that is informed by the insights of investment specialists from both the insurance industry and the regulatory community.

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1 Discussed in our related December 20, 2020 REVERSEInquiries Workshop "NAIC-related Developments for the Structured Investments Industry" webinar (video and presentation slides available here).

Mayer Brown

by J. Paul Forrester and Lawrence R. Hamilton

June 21 2021

Using and Navigating the Amended Form G-32 in Emma Dataport.

Underwriters: The form for submitting primary market information to the MSRB is changing on August 2, 2021.

Join the MSRB's free educational webinar on July 15 for details on how to use amended Form G-32.

Click here to learn more and to register.

SIFMA Raises Concerns On Proposed Solicitor Municipal Advisor Regulations: Cadwalader

SIFMA raised concerns on MSRB's proposed Rule G-46 ("Duties of Solicitor Municipal Advisors"). The proposed rule would codify previously issued interpretive guidance on the requirements applicable to solicitor municipal advisors under MSRB Rule G-17 ("Conduct of Municipal Securities and Municipal Advisory Activities").

In a comment letter, SIFMA took issue with the following aspects of the proposal, among others:

- the lack of clarity with respect to the standard of conduct applicable to solicitor municipal advisors (i.e., a fair dealing standard and not a fiduciary standard);
- the lack of precision in codifying guidance under MSRB Rule G-17;
- inconsistencies with MSRB Rule G-42, governing the duties of non-solicitor municipal advisors, as pertaining to (i) the documentation of the solicitor relationship, (ii) representations made to solicited entities, (iii) the lack of a list of prohibited conduct, (iv) the timing and method of disclosures, and (v) recordkeeping requirements;
- inaccuracies in the disclosure statement that solicitor municipal advisors are required to provide to solicited entities; and
- the lack of further clarification as to (i) what activities constitute an undertaking to solicit a solicited entity, (ii) inadvertent solicitation and (iii) the applicability of other MSRB rules.

SIFMA recommended that the MSRB continue to engage with market participants to better understand the types of activities that constitute a solicitation, different compensation structures and suitable disclosures for this line of business.

Cadwalader, Wickersham & Taft LLP

25 June 2021

NFMA Newsletter.

The June 2021 Municipal Analysts Bulletin is available.

Click here to view.

BDA Washington Weekly – Deal Reached but Questions Remain

Read the BDA Washington Weekly.

Bond Dealers of America

June 25, 2021

MSRB Notice 2021-07 – Fair Dealing Solicitor Municipal Advisor Obligations and New Draft Rule G-46: SIFMA Comment Letter

SUMMARY

SIFMA provided comments to the Municipal Securities Rulemaking Board (MSRB) on MSRB Notice 2021-07 requesting comment on fair dealing solicitor municipal advisor obligations and new draft Rule G-46. According to the Notice, new draft Rule G-46 would (i) codify interpretive guidance previously issued in 2017 that relates to the obligations of "solicitor municipal advisors" under MSRB Rule G-17 (the "G-17 Excerpt for Solicitor Municipal Advisors") and (ii) add additional requirements that would align some of the obligations imposed on solicitor municipal advisors with those applicable to non-solicitor municipal advisors.

We applaud the MSRB's effort to seek information and insight from commenters to further inform codifying existing interpretive guidance and developing new MSRB rules, including new draft Rule G-46. We do, however, have concerns with (1) the codification of the G-17 Excerpt for Solicitor Municipal Advisors, (2) lack of consistency with non-solicitor municipal advisor rules, (3) the rule text of new draft Rule G-46, and (4) certain other matters.

Read the SIFMA comment letter.

Firm Settles FINRA Charges for MSRB Reporting Violations Involving SHORT System: Cadwalader

A firm settled FINRA charges for reporting violations involving the MSRB's Short-Term Obligation Rate Transparency ("SHORT") System.

In a Letter of Acceptance, Waiver and Consent, FINRA found that the firm failed to report to the SHORT System a minimum denomination for approximately 1,660 submissions, and inaccurately reported the maximum interest rate for approximately 1,300 submissions. With regard to the minimum denomination reporting failures, FINRA stated that the firm's reporting system "did not require the entry of the minimum denomination field." When transmitting data to the MSRB's Electronic Municipal Market Access (or "EMMA") System, FINRA found that the firm's reporting system would (i) populate the minimum denomination field with a zero instead of rejecting the report as incomplete and (ii) use the auction's interest rate instead of the security's maximum interest rate. As a result, FINRA found that the firm violated MSRB Rule G-34 ("CUSIP Numbers, New Issue, and Market Information Requirements").

FINRA also found that the firm failed to:

- keep accurate internal records of the maximum interest rate field in 64 instances, in violation of MSRB Rule G-8 ("Books and Records to Be Made by Brokers, Dealers, and Municipal Securities Dealers and Municipal Advisors"); and
- include in its supervisory system a review of the accuracy of the information it submitted to the SHORT System, in violation of MSRB Rule G-27 ("Supervision").

To settle the charges, the firm agreed to (i) a censure, (ii) a $35,000 fine ($20,000 for the reporting and books and records violations, and $15,000 for the supervisory violations) and (iii) an undertaking to revise its written supervisory procedures to address the described deficiencies.

Cadwalader Wickersham & Taft LLP

June 15 2021

BDA's Public Finance Leadership Roundtable: Event Recap

Yesterday, the BDA held its Public Finance Leadership Roundtable. The webinar was attended by dozens of representatives from BDA member firms and was sponsored by Quarles & Brady, DPC Data, and Lumesis. The panel discussion focused on the most recent market, legislative and regulatory topics facing middle-market banks and dealers in 2021.

A recording of the event can be viewed here.

Roundtable Recap

The panel was moderated by Jeff Peelen, Partner, Quarles and Brady and featured:

- Frank Fairman, Managing Director and Head of Public Finance Services, Piper Sandler
- Mark Borrelli General Counsel, Huntington Securities,
- Anne Noble, Managing Director, and Chair of the Public Finance Executive Committee, Stifel; and
- Brian Battle, Director and Principal, Performance Trust.

Roundtable Agenda

- Workforce Challenges/Strategies/Silver Linings
- Post-COVID office/virtual challenges generally
- Challenges getting out to see clients especially w/ "next generation"
- Recruiting issues
- What is the "typical" path to bankers these days?

Legislative Update

- Federal legislative update from the BDA

Business Trends

- Will (lower rates and) higher volume continue?
- Last year: flight to quality
- This year: the emergence of high yield
- "Green" and ESG deals
- Impact of federal dollars — e.g., schools
- Increased project costs (labor & supplies in general)
- Slow-down of taxable refundings
- Pensions borrowings bolstering taxable volume

Regulatory Environment

- Expectations from new SEC leadership
- Fundamentally different views (MAs, underwriters)
- Implications of coming back to the office
- Remote inspections

- G-17
- Politicization (e.g., gun manufacturers)

Bond Dealers of America

June 17, 2021

Direct Pay Bonds and PABs Remain in Spotlight – Other Muni Provisions Expected to Receive Continued Support

As noted yesterday, a bipartisan group of 21 senators released the latest infrastructure compromise, a $1 trillion package with nearly $600 billion of new spending. While light on pay-for details, the package did include some details on how the group plans to finance the plan, which includes a new direct-pay bond and references to increased private investment and P3 financing.

Muni Financing and Infrastructure

The most recent package includes a new direct-pay bond the American Infrastructure Bond (AIB). The legislation introduced by Senators Wicker (R-MS) and Bennet (D-CO) would create a new direct-pay bond with a flat 28% reimbursement rate. **In the original legislation, the AIB would be exempt from sequestration, however, no details on the sequestration treatment were included in the document released yesterday.**

While there was no direct mention of the reinstatement of tax-exempt advance refundings, or other muni priorities such as raising the BQ debt limit, the document did allude to the expansion of Private Activity Bonds to further finance the package. The MBFA and BDA remain committed to ensuring all priorities are included in the final package and continue to work to ensure more muni priorities are outlined once Congress and the Administration begin to write legislative text.

Bond Dealers of America

June 18, 2021

NFMA Draft Toll Roads RBP Released.

The National Federation of Municipal Analysts' Disclosure Committee has released the Draft Recommended Best Practices in Disclosure for Toll Road Bonds for public comment through August 15, 2021.

To view the paper, click here.

To view the press release, click here.

Public Input on Climate Change Disclosures: SIFMA

SUMMARY

SIFMA provides comments to the Securities and Exchange Commission (SEC) on issues to consider as the SEC evaluates creating climate change-related disclosure rules in response to Commissioner Lee's March 15, 2021 statement requesting public input on climate change disclosures.

Read the SIFMA comments.

SEC Climate Change-Related Disclosure Rules: SIFMA

SUMMARY

The Asset Management Group of SIFMA (SIFMA AMG) provides comments to the Securities and Exchange Commission (SEC) on issues to consider as the SEC evaluates creating climate change-related disclosure rules in response to Commissioner Lee's March 15, 2021 statement requesting public input on climate change disclosures.

Read the SIFMA comments.

Task Force on Climate-Related Finance Disclosures Public Consultation: June 7 – July 7, 2021

The TCFD is currently seeking public comment on two documents: *Proposed Guidance on Climate-related Metrics, Targets, and Transition Plans* and the associated *Measuring Portfolio Alignment: Technical Supplement*. We encourage participants to review these consultation documents prior to providing feedback.

Read Proposed Guidance on Climate-related Metrics, Targets, and Transition Plans

Read Measuring Portfolio Alignment: Technical Supplement

MSRB Fact Sheet on Inter-Dealer Municipal Trading.

MSRB statistical analysis on the use of alternative trading systems (ATSs) by municipal securities dealers.

Read the fact sheet.

MSRB Non-Transaction Based Compensation Trade Report.

MSRB report on non-transaction based compensation trades by municipal securities dealers.

Read the report.

GFOA-Led Industry Group Publishes Paper on Eliminating LIBOR in Bank Loan Contracts.

Together with several industry associations, GFOA has published a simple how-to for GFOA members unwinding their LIBOR-referenced bank loan contracts.

Download.

Application of Regulation Best Interest to Bank Dealers: SIFMA Comments

SUMMARY

SIFMA sent comments to the MSRB regarding Notice 2021-06 (the "Notice"), which proposes an amendment to MSRB Rule G-19 that would require bank dealers to comply with Securities Exchange Act Rule 15/-1 ("Regulation Best Interest") when making recommendations of securities transactions or investment strategies involving municipal securities to retail customers.

SIFMA supports the proposed amendment to extend Regulation Best Interest to bank dealers, as defined in the Notice. Although our members do not normally conduct retail activity through their affiliated banks that would implicate this rule, we believe that regulatory parity among regulated entities, which this amendment achieves, is a worthwhile goal.

Concerns with Amendments to MSRB Rules G-19 and G-48: SIFMA Comments

SUMMARY

SIFMA sent comments to the MSRB to address an issue regarding recent amendments to Rules G-19 and G-48 with the MSRB. As the MSRB continues its retrospective review of its rulebook, we appreciate the MSRB's willingness to listen to industry members regarding their thoughts on the rulebook. We welcome this opportunity for a constructive conversation on this issue with the MSRB.

GASB Requests Input on Proposed Improvements to Guidance for Accounting Changes and Error Corrections.

Norwalk, CT, June 1, 2021 — The Governmental Accounting Standards Board (GASB) today issued a proposal designed to improve the accounting and financial reporting requirements for accounting changes and error corrections.

The Exposure Draft (ED), *Accounting Changes and Error Corrections*, is intended to provide guidance that would lead to information that is easier to understand, more reliable, relevant, consistent, and comparable across governments for making decisions and assessing accountability.

The Board's current guidance on accounting changes and error corrections was established in GASB

Statement No. 62, *Codification of Accounting and Financial Reporting Guidance Contained in Pre-November 30, 1989 FASB and AICPA Pronouncements*, which was issued in 2010. That guidance originally was established in the 1970s. The GASB's pre-agenda research identified diversity in applying the existing standards in practice, including issues with selecting the appropriate category of accounting change or error correction.

The ED proposes definitions for the following categories:

- Changes in accounting principles
- Changes in accounting estimates
- Changes to or within the financial reporting entity
- Corrections of errors in previously issued financial statements.

The proposal would establish accounting and financial reporting guidance for each category of accounting changes and error corrections, including display in financial statements, note disclosures, and presentation in required supplementary information and supplementary information.

Stakeholders are asked to review the proposal and provide input to the Board by August 31, 2021. More information about commenting on the ED can be found in the document, which is available on the GASB website, www.gasb.org.

GASB Provides Guidance to Assist Stakeholders with Application of Its Pronouncements.

Norwalk, CT, June 2, 2021 — The Governmental Accounting Standards Board (GASB) today issued implementation guidance in the form of questions and answers intended to clarify, explain, or elaborate on certain GASB pronouncements.

Implementation Guide No. 2021-1, *Implementation Guidance Update—2021*, contains new questions and answers that address application of GASB standards on derivative instruments, fiduciary activities, leases, and nonexchange transactions. The guide also includes amendments to previously issued implementation guidance on the financial reporting model, as well as sales and pledges and intra-entity transfers.

The GASB periodically issues new and updated guidance to assist state and local governments in applying generally accepted accounting principles (GAAP) to specific facts and circumstances that they encounter. The GASB develops the guidance based on:

- Application issues raised during due process on GASB Statements and other pronouncements,
- Application issues identified during the first stage of the GASB's post-implementation reviews of the fiduciary activities and leases standards,
- Questions it receives throughout the year, primarily from governments and auditors, and
- Topics identified by members of the Governmental Accounting Standards Advisory Council and other stakeholders.

The guidance in Implementation Guides is cleared by the Board and constitutes Category B GAAP. The guide is available to download free of charge on the GASB website, www.gasb.org.

Mass. SJC Holds State False Claims Act Action Barred by Prior Public Disclosure.

The Massachusetts Supreme Judicial Court recently affirmed a trial court's judgment dismissing a relator's claims alleging that the defendants, certain financial institutions, collectively engaged in and conspired to engage in fraud, holding that the suit was subject to the public disclosure bar of the Massachusetts False Claims Act.

A copy of the opinion in *Rosenberg v. JPMorgan Chase & Co.* is available at: Link to Opinion.

The Massachusetts False Claims Act (MFCA), Mass. Gen. Laws ch. 12, 5A-50, prohibits making fraudulent claims against the Commonwealth and its municipalities. See G. L. c. 12, §§ 5A-5O. The statute also permits enforcement of that prohibition by means of qui tam actions, in which "[a]n individual, hereafter referred to as a relator, may bring a civil action . . . on behalf of the relator and the [C]ommonwealth or any political subdivision thereof." G. L. c. 12, §§ 5A, 5C (2). The Commonwealth may intervene and take over the case. G. L. c. 12, §§ 5C (3), 5D. Successful relators are awarded a percentage of the funds recovered by the Commonwealth. G. L. c. 12, § 5F.

The relator commenced this action on behalf of the Commonwealth against the defendants, certain financial institutions and their subsidiaries, alleging that the defendants collectively engaged in and conspired to engage in fraud in connection with resetting interest rates for certain municipal bonds, referred to as variable rate demand obligations (VRDOs).

The defendants argued that dismissal was required pursuant to the MFCA's public disclosure bar because the subject transactions had previously been disclosed to the public through news media and the relator was not an original source of the information concerning the fraud. The trial court agreed with the defendants and granted their motion to dismiss the complaint. The relator timely appealed.

The MFCA includes a public disclosure bar, which attempts to prevent "parasitic" suits, *United States ex rel. Ondis v. Woonsocket*, 587 F.3d 49, 53 (1st Cir. 2009), where a relator, "instead of plowing new ground, attempts to free-ride by merely repastinating previously disclosed badges of fraud," id., citing *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 26-27 (1st Cir. 2009), cert. denied, 561 U.S. 1005 (2010).

Where, as here, the Commonwealth chooses not to intervene, a multipart inquiry governs whether the public disclosure bar applies. "The first three parts of this inquiry ask: (1) whether there has been a prior, public disclosure of fraud; (2) whether that prior disclosure of fraud emanated from a source specified in the statute's public disclosure provision; and (3) whether the relator's qui tam action is [substantially the same as] that prior disclosure of fraud." *United States ex rel. Poteet v. Bahler Med., Inc.*, 619 F.3d 104, 109 (1st Cir. 2010).

Where "all three questions are answered in the affirmative, the public disclosure bar applies unless the relator qualifies under the 'original source' exception." *Poteet*, supra at 109-110, quoting *Ondis*, supra at 53-54.

The Supreme Judicial Court determined that the defendants here must establish that "both [the] misrepresented state of facts and [the] true state of facts" were in the public domain when the relator filed his claims. *Poteet,* supra.

The Court found that the defendants' representations that they would comply with the obligations in

their agreements with the VRDO issuers were set forth in several publicly available sources, including Municipal Securities Rulemaking Board (MSRB) rules that address remarketing agents' duties to VRDO issuers; Securities Industry Financial Markets Association (SIFMA) model disclosures; and the remarketing agreements, including remarketing circulars and official statements, reached between the defendants and the Commonwealth. See *Poteet*, 619 F.3d at 110, citing *United States ex rel. Maxwell v. Kerr–McGee Oil & Gas Corp.*, 540 F.3d 1180, 1185 (10th Cir. 2008).

The Supreme Judicial Court held that these sources disclosed that the defendants undertook (purportedly falsely) to comply with their obligations to obtain the lowest possible interest rates that would have permitted a sale on the market on a given rate determination date. Thus, the Court concluded that the defendants had shown a prior public disclosure of the misrepresented state of facts alleged in the complaint.

Accordingly, the Supreme Judicial Court turned to the question of whether the second element of fraud was disclosed — namely, whether there was a public disclosure of the "true state of facts so that the listener or reader may infer fraud." See *Poteet*, 619 F.3d at 110.

The Supreme Judicial Court held that it sufficed that other members of the public, albeit with sufficient expertise and after having conducted some analysis, could have identified the true state of affairs by using the data publicly available on the Electronic Municipal Market Access (EMMA) website. *United States ex rel. Findley v. FPC–Boron Employees' Club*, 105 F.3d 675, 688 (D.C. Cir.), cert. denied, 522 U.S. 865 (1997), citing *Springfield*, 14 F.3d at 655.

Having determined that there was a public disclosure of the essential elements of the fraud, the Supreme Judicial Court turned to consider the second prong of the public disclosure bar: whether the prior disclosure "emanated from a source specified in the statute's public disclosure provision." *Poteet*, 619 F.3d at 109. Specifically, the Court considered whether the forum in which the public disclosure was made fell within any of three sources enumerated in the statute, (1) "a Massachusetts criminal, civil or administrative hearing in which the [C]ommonwealth is a party"; (2) "a Massachusetts legislative, administrative, auditor's or inspector general's report, hearing, audit or investigation"; or (3) "the news media." See G. L. c. 12, § 5G (c).

According to the complaint, the first publicly disclosed element of the asserted fraud, namely, the misrepresentation that the defendants would undertake to obtain the lowest interest rates that, in their judgment, would permit the sale of the VRDOs, was disclosed in the governing remarketing agreements, including in the official statements. The Supreme Judicial Court held that these official statements comprised Massachusetts "reports," one of the statutorily enumerated sources.

Additionally, the second publicly disclosed element of the fraud — namely, the assertion that the defendants were not obtaining the lowest interest rate that would permit the sale of the VRDOs, and instead were remarketing the bonds en masse in a way that did not obtain the lowest rates — was disclosed on the EMMA website.

The Supreme Judicial Court held that the term "news media" is broad enough to encompass the many ways in which people in the modern world obtain financial news, including from publicly available websites on the Internet. See, e.g., *United States ex rel. Repko vs. Guthrie Clinic, P.C.,* U.S. Dist. Ct., No. 3:04CV1556 (M.D. Pa. Sept. 1, 2011), aff'd, 490 Fed. Appx. 502 (3d Cir. Aug. 1, 2012).

The Court found that EMMA is the "official repository for information on all municipal bonds" and provides updates to bond market information by means of the Internet; the website is publicly available and widely disseminated. Therefore, the Court concluded that EMMA is much like

traditional news sources that report market data and fall within the scope of the term "news media." See *Poteet*, 619 F.3d at 110.

The Supreme Judicial Court next considered the third prong of the public disclosure inquiry: whether the public disclosure includes "substantially the same allegations or transactions as alleged in the action or claim." *Poteet*, 619 F.3d at 109. A "complaint that targets a scheme previously revealed through public disclosures is barred even if it offers greater detail about the underlying conduct." *Winkelman*, 827 F.3d at 210, citing *Poteet*, 619 F.3d at 115.

Here, the Supreme Judicial Court held that the publicly disclosed information was sufficient to put the Commonwealth "on the trail of the alleged fraud" without the relator's assistance. See *Reed*, 923 F.3d at 744, citing *Fine,* 70 F.3d at 571.

Because the public disclosure bar was applicable in this case, the Supreme Judicial Court reasoned that the complaint must be dismissed unless the relator was an "original source." See *Poteet*, 619 F.3d at 109-110. General Laws c. 12, § 5A, defines two types of relators who may qualify as original sources:

"an individual who: (1) prior to a public disclosure under paragraph (3) of [§] 5G, has voluntarily disclosed to the [C]ommonwealth or any political subdivision thereof the information on which allegations or transactions in a claim are based; or (2) has knowledge that is independent of and materially adds to the publicly-disclosed allegations or transactions, and who has voluntarily provided the information to the [C]ommonwealth or any political subdivision thereof before filing a false claims action."

The relator contended that his knowledge was "independent of" EMMA because the complaint did not allege that he relied on that website to obtain the data underlying his analysis; it sufficed to defeat the defendants' motion, he argued, that the complaint alleged that his forensic analysis also used nonpublic, proprietary sources notwithstanding that the same data was available from EMMA.

However, the Supreme Judicial Court concluded that the relator cited no authority for the proposition that a relator may take advantage of the original source exception by using a nonpublic source to access the exact same data readily available from public sources. To the contrary, the Court noted that "when a relator's qui tam action is based solely on material elements already in the public domain, that relator is not an original source." *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039, 1045 (10th Cir. 2004), cert. denied, 545 U.S. 1139 (2005).

The Court determined that the EMMA website publicly reported the same data upon which the relator relied, and the relator's analysis depended entirely on the interest rate data, which was available on EMMA. Thus, the Court concluded that the relator's analysis could not be said to be "independent of" the publicly disclosed transaction discussed. See *Ondis*, 587 F.3d at 59.

Accordingly, the Supreme Judicial Court affirmed the trial court's judgment.

Maurice Wutscher LLP – Daniel Miller

June 1 2021

Massachusetts High Court Adopts Broad Reading of Commonwealth's Public

Disclosure Bar.

In a May 2021 decision, the Massachusetts Supreme Judicial Court ("SJC") affirmed the dismissal of a Massachusetts False Claims Act ("MFCA") suit on the grounds that it was barred by the MFCA's public disclosure bar. The suit, brought by relator Johan Rosenberg ("Relator"), alleged that Defendant banks conspired to engage in fraud in connection with resetting interest rates for certain municipal bonds known as "variable rate debt obligations" or VRDOs.

Specifically, Relator alleged that Defendants inflated interest rates by falsely representing to municipal issuers in the Commonwealth of Massachusetts that they would actively and individually reset VRDO rates, but instead mechanically reset rates without considering the individual characteristics of the VRDOs. Relator further alleged that Defendants violated their obligations to municipal issuers in the Commonwealth by failing to market these VRDOs at the lowest possible rate and by collecting millions of dollars in fees as liquidity providers and for remarketing services that Defendants did not provide. Relator claimed that he had uncovered the Defendants' alleged "fraud" through a "forensic analysis" of interest rate data published on the Electronic Municipal Market Access ("EMMA") website. The Business Litigation Session of the Massachusetts Superior Court granted Defendants' motion to dismiss in 2019, Relator appealed, and the SJC transferred the case sua sponte from the Appeals Court.

In affirming Defendants' motion to dismiss, the SJC held that Relator's claims satisfied each prong of the MFCA's public disclosure bar. First, the critical elements of the purported fraudulent transactions were in the public domain because both the purported source of Defendants' duty and the data on which the Relator relied to identify the purported fraud were publicly disclosed. Second, the SJC found that the information was publicly disclosed through the MFCA's statutorily enumerated sources, namely Massachusetts "reports" and the "news media." Specifically, the claimed source of Defendants' duty to the Commonwealth was publicly available through remarketing agreements, which constitute Massachusetts "reports" under the MFCA. And EMMA, the financial website from which the Relator retrieved the data on which he conducted his analysis, constitutes "news media" under the MFCA. The SJC declined to adopt Relator's restrictive view of "news media," and found that the term "is broad enough to encompass the many ways in which people in the modern world obtain financial news, including from publicly available websites on the Internet." Finally, the SJC found the public disclosure included "substantially the same allegations or transactions as alleged" in the complaint.

The SJC declined to accept Relator's argument that he should qualify as an "original source," such that the MFCA's public disclosure bar would not apply. The SJC found that the original source exception is narrow and that in this case Relator's analysis depended on publicly available EMMA data and Relator did not "materially add" to the publicly disclosed information through his allegation that Defendants engaged in "robo-resetting."

Prior to this decision, there had been limited case law interpreting the MFCA's provisions, including its public disclosure bar and original source exception. The SJC's decision provides precedent for a broad interpretation of "news media" under the MFCA's public disclosure bar, and a limited scope of the MFCA's original source exception.

A copy of the Court's opinion can be found here.

Sidley Austin LLP – Kathryn L. Alessi, Kathleen L. Carlson and Alexander J. Kellermann

May 26 2021

Illinois Supreme Court Holds Challenge To GO Bonds Is Barred By Laches, But Avoids Underlying Constitutional Issues.

On May 20, 2021, the Illinois Supreme Court finally put to rest a long-simmering challenge to the validity of around $14 billion of Illinois general obligation bonds.1 The Supreme Court unanimously affirmed, albeit on different grounds, a trial court's August 2019 order2 denying a petition by a prominent political activist to file a lawsuit challenging those bonds. In affirming the trial court's decision, the Supreme Court also reversed an intermediate appellate court's August 2020 decision3 permitting the challenge to go forward.

The original 2019 trial court decision had ruled on the underlying issue of whether the challenged bonds violated a provision of the Illinois Constitution requiring long-term debt to be issued only for a "specific purpose." However, the Supreme Court intentionally avoided that constitutional issue, instead holding that the activist's petition was barred by the equitable doctrine of *laches*, which prevents the filing of lawsuits where unreasonable delay and a lack of due diligence has resulted in prejudice to another party. The Supreme Court found that the activist's delay of 2 to 16 years in challenging the relevant bonds constituted a lack of due diligence, and found that the State of Illinois would be prejudiced by this delay if the activist's suit were permitted to go forward, particularly if the suit resulted in damage to the State's credit rating. The Supreme Court also clarified the standard for denying a petition to bring a taxpayer action under Illinois law, holding that such a petition may be denied not only where it is "frivolous" or "malicious," but also where it is "otherwise unjustified" for any reason, including because the State has a viable affirmative defense, such as *laches*.

The Supreme Court's decision is broadly consistent with the traditional view that government debt generally cannot be retroactively invalidated once issued, at least where there has been a significant lapse of time since the issuance of the debt. The decision also suggests that protecting a state's credit rating is likely to be an overriding consideration for many state supreme courts, meaning that legal challenges that would result in defaults or downgrades seem unlikely to succeed if they reach the highest state courts, whatever legal rationale those courts may devise for defeating such challenges.

However, by avoiding the underlying issue of whether the challenged bonds were valid under the "specific purposes" clause of the Illinois Constitution, the Supreme Court left municipal bond markets without any clear guidance as to the meaning of that clause, or the meaning of similar clauses limiting the issuance of long-term debt in other state constitutions. The decision therefore leaves open the possibility that future litigants could make renewed, more timely attempts to challenge bonds under that or similar constitutional provisions.

In addition, because the meaning of the "specific purposes" clause remains unresolved, the meaning of that provision could potentially reemerge as a key issue in any future restructuring of Illinois's debt.

Background

Under Illinois law, private citizens have standing to bring actions in their capacity as taxpayers to enjoin the disbursement of public funds for improper purposes. *See* 735 ILCS 5/11-303. Before bringing such an action, however, a private citizen must first file a petition seeking leave from a court. Id. The court may grant such a petition if the court "is satisfied that there is reasonable ground for the filing of [the taxpayer] action." *Id*.

On July 1, 2019, a prominent political activist, John Tillman ("**Tillman**"), filed such a petition in his capacity as an Illinois taxpayer. The proposed complaint attached to the petition also identified hedge fund Warlander Asset Management, L.P. ("**Warlande**r") as a plaintiff in the proposed action. The complaint primarily alleged that Illinois's 2003 and 2017 general obligation (or "GO") bond issuances violated a provision of the Illinois Constitution that requires long-term debt to be for a "specific purpose" (Ill. Const. art. IX, § 9), arguing that "specific purposes" include only "specific projects in the nature of capital improvements, including roads, buildings, and bridges." Specifically, the complaint alleged that Illinois's 2003 issuance of "Pension Funding Bonds" failed to satisfy this " specific purposes" requirement, because it allocated bond proceeds to be used to reimburse the State's General Fund for past contributions to the State's retirement systems. The complaint similarly alleged that Illinois's 2017 issuance of "Income Tax Proceed Bonds" failed to satisfy this "specific purposes" requirement, because it allocated bond proceeds to be used to pay past due bills related to general operating expenses.

The Illinois Attorney General opposed the petition on behalf of the government officer defendants, which included the Governor, Treasurer, and State Comptroller. These defendants argued that Tillman failed to establish reasonable grounds for filing his taxpayer complaint because his constitutional claims lacked merit. Alternatively, they contended that Tillman's complaint was barred by laches because he waited to file his action until years after the statutes authorizing the bonds were enacted and the bonds were issued.

In addition, two holders of challenged bonds, Nuveen Asset Management, LLC and AllianceBernstein, L.P., filed an *amicus* brief in which they alleged that Warlander had an "ulterior purpose" for joining the litigation because it had purchased credit default swaps that would pay off if the litigation caused Illinois to default on its debt.

Trial Court Decision

In August 2019, Sangamon County trial court Judge Jack D. Davis, II, denied Tillman's petition by ruling on the underlying merits of Tillman's proposed complaint, holding that the challenged bonds satisfied the "specific purposes" requirement in the Illinois Constitution because the legislation authorizing the bonds "stated with reasonable detail the specific purposes for the issuance of the bonds." Judge Davis therefore treated the "specific purposes" provision as merely requiring that the legislature identify the purposes for which bond proceeds would be used, rather than requiring that the intended purposes themselves be "specific" (such as capital improvements) as opposed to "general" (such as general operating expenses).

Judge Davis also held broadly that allowing Tillman to file the complaint "would result in an unjustified interference with the application of public funds." He stated that Tillman was asking the Court "to address a non-justiciable political question and substitute its judgment for the Illinois Legislature some two decades after it occurred," thereby violating "the separation of powers." His decision therefore suggested that the validity of the debt might be effectively immune from legal challenge.

Judge Davis did not address the defendants' laches argument or their other affirmative defenses.

Appellate Court Decision

Tillman appealed to the Illinois Fourth District Appellate Court, which reversed Judge Davis's order, holding that the trial court erred by denying Tillman's petition.4

Citing the Illinois Supreme Court's "seminal case" of *Strat-O-Seal Manufacturing Co. v. Scott*, 190

N.E.2d 312 (1963), the appellate court explained that the purpose of requiring a petition for leave prior to the commencement of a taxpayer action was to "provide a check upon the indiscriminate filing of such suits." Absent such a check, taxpayers could bring such suits for "an ulterior or malicious purpose" and thereby "seriously embarrass the proper administration of public affairs." The appellate court concluded that under *Strat-O-Seal*, the relevant standard for granting leave is simply "whether the facts alleged in the petition and proposed complaint, taken as true, disclose a reasonable ground for the filing of a suit."

Applying this standard to Tillman's petition, the appellate court concluded that "nothing in the record indicates that the proposed complaint was frivolous, filed for a malicious purpose, or is otherwise unjustified." Specifically, the court concluded that "Tillman's complaint sets forth a colorable reading of the Illinois Constitution that does not appear to be frivolous on its face."

While the appellate court framed its decision as a straightforward application of the *Strat-O-Seal* standard, its application of that standard arguably lowered the bar for granting leave to file taxpayer actions, as the appellate court focused specifically on whether the proposed complaint was "frivolous" or "malicious" and on whether the petitioner's claims were merely "colorable," rather than placing the burden squarely on the petitioner to establish that reasonable grounds existed for filing the suit.

Unlike the trial court, the appellate court expressed "no opinion on the ultimate merits of Tillman's claims," but "concluded that the petition and complaint state reasonable grounds for filing suit." The appellate court also declined to opine on the strength of the defendants' affirmative defenses, including *laches*.

Supreme Court Decision

The State Attorney General appealed the appellate court's decision to the Illinois Supreme Court, which reversed the appellate court's decision and affirmed Judge Davis's original trial court order denying Tillman's petition, albeit based on a finding of laches rather than on Judge Davis's original assessment of the merits of Tillman's complaint. In the process, the Supreme Court also clarified the standard for denying petitions to bring a taxpayer action under Illinois law.

Standard for Denying Petition for Leave to File a Taxpayer Action

The Supreme Court began by addressing the standard for denying a petition to file a taxpayer action, concluding that "the appellate court's holding that the trial court is limited to addressing whether a proposed complaint is frivolous or malicious when deciding whether to allow a . . . petition [is] incorrect." Instead, the Supreme Court concluded that a petition could also be denied when it was "otherwise unjustified," including because a valid affirmative defense existed to the underlying complaint.

To reach this conclusion, the Supreme Court initially focused on the meaning of the phrase "reasonable ground" in the governing statute, which provides that a court may grant a petition to file a taxpayer action if the court "is satisfied that there is reasonable ground for the filing of [the taxpayer] action." 735 ILCS 5/11-303. The appellate court's overly narrow interpretation of the phrase "reasonable ground" stemmed, in the Supreme Court's view, from a misreading of the seminal *Strat-O-Seal* case. In that case, the Illinois Supreme Court permitted a taxpayer action to go forward after stating that "[w]e find nothing in the present record to indicate that the purpose is frivolous or malicious, or that a filing of the complaint is **otherwise unjustified**."

Based on the *Strat-O-Seal* court's consideration not only of whether the petition in that case was frivolous or malicious, but also of whether it was "*otherwise unjustified*," the Supreme Court

concluded that a petition to file a taxpayer action could be denied for reasons other than that it is frivolous or malicious. In particular, the Supreme Court concluded that "the statute does not expressly preclude the reviewing court from examining the legal merits of the complaint or addressing what are ordinarily considered to be affirmative defenses."

The Doctrine of Laches

The Supreme Court's conclusion that the standard for denial of a petition to file a taxpayer action can include consideration of affirmative defenses set the stage for the remainder of its opinion, in which it proceeded to affirm the denial of Tillman's petition based on just such an affirmative defense, namely the equitable doctrine of *laches*. As the Supreme Court explained, *laches* is an equitable defense asserted against a party "who has knowingly slept upon his rights" and shown a lack of "due diligence" by "failing to institute proceedings before he did." *Laches* is therefore somewhat similar to a statute of limitations in that it penalizes a party for delay in bringing an action. Whereas a statute of limitations "forecloses an action based on a simple lapse of time," however, laches is based on the idea that it would be inequitable to allow a party to bring an action after there has been "some change in the condition or relation of the property and parties." As the Supreme Court further explained, the doctrine is based on the notion that courts should not "come to the aid of a party who has knowingly slept on his rights to the detriment of the opposing party."

The State Attorney General had asserted laches as a defense as early as the trial court briefing, but neither the trial court nor the intermediate appellate court had engaged with or relied on this defense in their respective opinions. The Supreme Court nonetheless emphasized that it was free to "sustain the [trial] court's judgment on any ground supported by the record, even a ground not relied on by that court." The Supreme Court also indicated that it was choosing to focus on *laches* specifically in order to avoid engaging with the larger constitutional issues raised by the case, citing the so-called canon of constitutional avoidance, which holds that "cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort."

The Supreme Court identified two "fundamental elements" of *laches*, namely (1) "lack of due diligence by the party asserting the claim" and (2) "prejudice to the opposing party." It analyzed each of these elements in turn.

Lack of Due Diligence

With respect to the "lack of due diligence" element of laches, the Supreme Court found it relevant that Tillman had delayed for years in filing his petition despite having notice of the relevant bond issuances. Specifically, Tillman filed his petition around 16 years after the 2003 "Pension Funding Bonds" had been issued, and around 2 years after the 2017 "Income Tax Proceed Bonds" had been issued. The Supreme Court found this delay to be unreasonable, citing prior Illinois precedents where taxpayer petitions had been denied under the doctrine of laches based on delays ranging from 1 to 4 years. The Court also presumed that Tillman had had sufficient notice to file his petition earlier, because the statutes authorizing the bond issuances were matters of public record.

Prejudice to the State

With respect to the "prejudice" element of laches, the Supreme Court cited to Illinois precedents establishing that the prejudice element is satisfied where the plaintiff waits to file suit until after the defendant has (i) expended large sums of money or (ii) made irrevocable transactions rendering it impossible to return to the status quo. The Supreme Court found both forms of prejudice to be present in Tillman's case, because Illinois had issued the challenged bonds, applied the bond proceeds as specified in the applicable statutes, and made payments on the bonds for years before

Tillman filed his petition. Perhaps getting to the heart of what the Court viewed as the main prejudice to the State, the Supreme Court also specifically noted that "granting relief to petitioner would amount to a *de facto* default on outstanding bonds that are backed by the full faith and credit of the State," and would therefore "have a detrimental effect on the State's credit rating."5

Based on its conclusion that both of the necessary elements of *laches* had been satisfied, the Supreme Court reversed the judgment of the intermediate appellate court and affirmed Judge Davis's original trial court order denying Tillman's petition to file a taxpayer action.

Conclusion

As noted in prior updates on the *Tillman* case,6 the dominant view in modern public finance is that government debt generally cannot be invalidated retroactively once issued. This view makes sense from a policy perspective, because the threat of retroactive invalidation could destabilize the bond markets, increase borrowing costs for government issuers, or even make it impossible for states and municipalities to borrow at all.

The Illinois Supreme Court's ruling in *Tillman* is generally consistent with this traditional view. By basing its decision on a fact-specific analysis of *laches* rather than on a per se rule that debt cannot be retroactively invalidated, however, the Supreme Court did leave some room for future litigants to attempt to challenge public debt under circumstances that are less likely to give rise to a finding of *laches*, such as by bringing a challenge immediately following the issuance of new bonds, or even in the period between the time bonds are authorized and the time they are issued.

Another often-articulated principle of public finance is that long-term debt should generally be issued only to fund capital improvements rather than annual operating expenses. By consciously choosing to avoid interpreting the "specific purposes" clause in the Illinois Constitution, however, the Supreme Court left unresolved the question of whether this traditional limitation on the use of long-term debt is actually legally enforceable in Illinois or in other states with similar provisions in their state constitutions. The Supreme Court's decision to avoid this substantive issue again leaves the door open for future litigants to try their hand at enforcing the "specific purposes" clause of the Illinois Constitution or similar restrictions in other state constitutions, either because they are ideologically opposed to government borrowing, as appears to have been the case with Tillman, or because they are pursuing a particular investment strategy, as appears to have been the case with Warlander.

In addition, the Supreme Court's decision leaves the $14 billion of GO bonds challenged by Tillman in place as one component of Illinois's substantial debt burden, which has given Illinois one of the lowest credit ratings among the states. In the event Illinois were at some point to pursue a restructuring of its debt load, the Supreme Court's decision not to address the "specific purposes" question could allow the "specific purposes" issue to reemerge as one potential basis for negotiating or litigating the treatment of particular bond issuances based on how susceptible such issuances are to a "specific purposes" challenge. As such, the *Tillman* case may have provided more a preview—than a resolution—of some of the key issues that may come into play in any future negotiations or litigations over Illinois's debt.

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1 *Tillman v. Pritzker*, 2021 IL 126387 (Ill. May 20, 2021). Of the approximately $16 billion of original issuance amount of the challenged bonds, approximately $14 billion remains outstanding.

2 See *Tillman v. Pritzker*, Case No. 2019-CH-000235 (Cir. Ct. Sangamon Cnty., Ill. Aug. 29, 2019).

3 See *Tillman v. Pritzker*, Case No. 4-19-0611 (Ill. App. Ct. 4th Dist. Aug. 6, 2020).

4 Warlander did not participate in the appeal.

5 The Supreme Court also rejected an argument by Tillman that the State would not suffer any prejudice from his delay because he did not seek to undo past payments already made on the bonds and instead sought only to enjoin future payments. In rejecting this argument, the Supreme Court cited past Illinois precedents where *laches* was found to bar taxpayer actions that sought to enjoin even future bond issuances or payments.

6 *See* "Illinois Judge Holds That Courts Cannot Rule Retroactively on Validity of State Debt," September 5, 2019, *available at* https://www.cadwalader.com/resources/clients-friend-memos/illinois-judge-holds-that-courts-cannot-rule-retroactively-on-validity-of-state-debt; "Illinois Appeals Court Reignites GO Bond Challenge," August 11, 2020, *available at* https://www.cadwalader.com/resources/clients-friends-memos/illinois-appeals-court-reignites-go-bond-challenge.

Cadwalader Wickersham & Taft LLP – Ingrid Bagby, Ivan Loncar , Michele C. Maman, Jed Miller , Lary Stromfeld and Casey Servais

May 26, 2021

MSRB Seeks Comment on Potential Changes to Rules on Notifications to Municipal Securities Customers.

Washington, DC – As a next step in its ongoing retrospective rule review, the Municipal Securities Rulemaking Board (MSRB) today published a request for comment on potential amendments designed to clarify which customers should receive annual notifications under MSRB rules.

The proposed amendments to MSRB Rule G-10 clarify the requirements for dealers to provide annual notifications, including information about the availability of a brochure on the MSRB's website that describes the protections that may be provided by MSRB rules and how to file a complaint with an appropriate regulatory authority, to those customers who would be best served by receipt of the information.

The MSRB also seeks comments on an associated draft amendment to MSRB Rule G-48, on transactions with sophisticated municipal market professionals, to exclude transactions with them from the application of draft Rule G-10.

"The MSRB has been hearing from stakeholders that it is an unnecessary burden on dealers to provide the annual notifications to customers that do not hold or actively trade municipal securities," said MSRB Chief Regulatory Officer Gail Marshall. "Today's request for comment is part of the MSRB's commitment to ensure our rules achieve the intended benefits in furtherance of the MSRB's mission to protect investors, state and local governments, and the public interest."

The MSRB established a 45-day comment period for the proposal, with comments due by June 28, 2021. After considering comments on the proposal, the MSRB would file any proposed changes to its rules with the Securities and Exchange Commission (SEC) for approval.

Date: May 14, 2021

Contact: Leah Szarek, Chief External Relations Officer
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Treasury Issues Guidance for Non-Entitlement Units of Government.

On May 25, the Treasury Department released guidance for Non-Entitlement Units (NEU) of governments regarding funds received from the Coronavirus Local Fiscal Recovery Fund. As defined in section 603(g)(5) of the Social Security Act, NEUs are jurisdictions typically serving less than 50,000 constituents. The guidance outlines the step-by-step process required of states to receive funds, qualifications for identifying NEUs, allocation calculations and more.

Resources from the Treasury Department can be found below:

- U.S. Treasury NEU Guidance
- U.S. Treasury NEU Landing Page

GFOA's Federal Liaison Center will continue to monitor guidance released by the federal government.

SIFMA Statement on Municipal Bond Provisions in the FY 2022 Budget.

Washington, D.C., May 28, 2021 – SIFMA today issued the following statement from president and CEO Kenneth E. Bentsen, Jr. on the municipal bond provisions in the FY 2022 budget:

"SIFMA appreciates the inclusion of municipal bond related provisions in the budget released today, including the $50 billion for Qualified School Infrastructure Bonds (QSIBs), the $15 billion increase in Private Activity Bond (PAB) authorization as created under SAFETEA-LU for transportation infrastructure, and the proposal to add public transit, passenger rail, and infrastructure for zero emissions vehicles as qualified activities for which such bonds may be issued without being subject to state private activity bond volume caps.

"SIFMA encourages the administration to continue to work with bipartisan leaders in Congress to further expand its infrastructure proposals with additional commonsense municipal finance tools. To that end SIFMA remains focused on our core municipal priorities, which will aid in building, maintaining and improving our infrastructure and lead to job creation and economic growth. These include reinstating advance refunding, authorizing a new general purpose direct payment bond program on a permanent basis, further expanding the volume cap and uses for private activity bonds and increasing the annual limit on the amount of tax-exempt obligations that may be issued to qualify for the small issuer exception to the tax-exempt interest expense allocation rules. In addition, we continue to believe preserving the tax-exemption for interest earned by investors on state and local bonds, which is the financing mechanism for the clear majority of infrastructure projects that state and local governments undertake, is crucial."

May 28, 2021

FAF Issues 2020 Annual Report, "Standards that Work from Main Street to Wall Street"

Norwalk, CT—May 26, 2021 — The Financial Accounting Foundation (FAF) today posted its 2020 Annual Report to the FAF website. The report is available as a printable PDF file and as an interactive digital version.

The annual report theme is "Standards That Work from Main Street to Wall Street." The report provides a look at how the FASB and GASB supported stakeholders through an unprecedented year. By monitoring and responding to the situation as it evolved, the Boards sought to reduce the impact of the COVID-19 pandemic by providing technical assistance, delaying standard implementations, and always ensuring stakeholder needs were the top priority.

The 2020 Annual Report includes:

- Letters from FASB, GASB, and FAF leadership
- Snapshots of 2020 stakeholder outreach and engagement along with the many actions taken to ease the unforeseen challenges of the year
- Complete 2020 management's discussion and analysis and audited financial statements (previously posted to the FAF website).

The annual report is available online as a downloadable PDF file, along with a mobile-friendly version at accountingfoundation.org/street. The online version also includes complete lists of all FASB and GASB advisory group members, including the Emerging Issues Task Force and the Private Company Council.

The Washington Weekly – Republican Infrastructure Counter/ MBFA Submits Testimony

Read the Washington Weekly.

Bond Dealers of America

May 28, 2021

Emerging Environmental, Social, and Governance Trends in the Municipal Bond Market.

Background

The environmental, social, and governance (ESG) movement has been newly adapted as a best practice for disclosure in the municipal market. ESG encompasses many facets of investing, including investments focused on sustainability, such as a green bond, or social improvement, such as a social bond. ESG provides an expansive framework for viewing both risks and opportunities. It may be utilized as a tool for consideration by issuers, rating agencies, and investors to view existing

risk factors through a modern lens.

Green Bonds and Social Bonds

Investors' views of ESG as a broader social movement are represented by the targeted funding of projects that align with specific ESG goals through the emergence and popularization of bond designations, primarily green bonds and social bonds, which are based upon intended project impact. Investors are attracted to these specifically designated bonds because they allow them to better target the impact of their financial investment based upon their personal beliefs and interests. While no formal process for issuing such green or social bonds currently exists, the market has established standards, as published by the International Capital Market Association (ICMA).[1] These standards are fourfold:

1. Use of Proceeds for a clear environmental or social benefit;
2. Process for Project Evaluation and Selection should be described to the investors;
3. Management of Proceeds should be allocated to green or social projects; and
4. Reporting annually on use of proceeds to investors.

Additionally, ICMA recommends external review to verify the issuer's green or social claims through second opinion, verification, certification, and/or scoring or rating as a green or social bond.

ESG Disclosure as a Best Practice

According to Moody's, the "ability to address ESG risk will increasingly differentiate credit quality after [the COVID-19] pandemic."[2] The rating agency discusses how in a post-pandemic world, limited resources and an increase for services will challenge the public issuer's ability to operate while maintaining a strong financial outlook. Climate risks, if not addressed and properly prepared for, will likely affect credit ratings in the long term. Issuers need to consider which costs may be deferred and which are most critical, as well as which resources are most critical to ensure disaster preparedness due to increased climate risks, such as extreme weather and increased flooding. The pandemic forced social inequities into public view, especially healthcare and racial inequities. Further, demographic trends may play a role in increasing demands upon the healthcare system, while also potentially reducing revenue for higher education institutions. Such social factors are likely to increase the pressure on governments for more public services and intervention amidst sinking revenues and strained budgets. Governance is key to proper budgeting and financial planning, as well as a mechanism for addressing such climate and social issues.

Recent publications by both the Securities and Exchange Commission (SEC) and the Government Finance Officers Association (GFOA) have signaled requirements for ESG disclosures. On March 8, 2021, the GFOA adopted ESG disclosures as a best practice for inclusion in municipal bond offering documents.[3] The GFOA recommends three elements in crafting a suitable ESG disclosure:

> "(1) vulnerability assessment, or recognition of ESG related risks, (2) plans/preparedness for mitigating such risks, and (3) progress updates, including impacts of recent ESG elements/events and how they shape future response."[4]

In a March 11 public statement, Acting Director of the SEC's Division of Corporation Finance John Coates said, "Going forward, I believe SEC policy on ESG disclosures will need to be both adaptive and innovative. We can and should continue to adapt existing rules and standards to the realities of climate risk. . . We will also need to be open to and supportive of innovation – in both institutions and policies on the content, format and process for developing ESG disclosures."[5] As ESG grows in

significance in both the corporate and municipal worlds, municipal issuers can look to guidance from public bodies, as well as corporate issuers and filings.

This burgeoning trend in disclosure has not been widely incorporated in municipal offering documents. As such, issuers may struggle to determine the materiality of ESG-related issues and disclosures. The GFOA acknowledges such disclosure should be considered a case-by-case basis based on the characteristics of the issuer, noting: "The key for municipal issuers is to determine which ESG factors are material to their own credit profile and relevant to investors."[6] The GFOA does not provide any standard disclosure language.

Takeaways

Bond markets will likely continue to see a growth in various ESG-targeted bonds, as well as a continued discourse related to ESG issues. Municipal issuers should begin to consider ESG disclosures, if material, as part of their offering documents for the project to be financed, and, more broadly, the ESG factors related to the municipality. Within the ESG risk analysis framework, municipalities and other public issuers must determine which ESG risks or opportunities are material, providing necessary disclosure, but also a mechanism for fostering financial resiliency.

by Emma H. Mulvaney

May 20, 2021

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[1] Green Bond Principles, International Capital Market Association, June 2018; Social Bond Principles, International Capital Market Association, June 2020

[2] Sector In-Depth – Public-Finance-US – 30Oct20.pdf (cdfa.net)

[3] https://www.gfoa.org/materials/esg-disclosure (While the GFOA recommends including ESG disclosure information as part of primary offering documents, it also notes that material factors are already required to be included in such documents).

[4] GFOA, ESG Considerations for Governmental Issuers

[5] SEC.gov | ESG Disclosure – Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets

[6] GFOA, ESG Considerations for Governmental Issuers

SIFMA Comments to Proposed Amendments to the Margin Rule Regarding When Issued and Other Extended Settlement Transactions.

SUMMARY

SIFMA provides comments to the Financial Industry Regulatory Authority, Inc. (FINRA) on proposed amendments to the margin rule regarding when issued and other extended settlement transactions; FINRA Regulatory Notice 21-11.

Read the SIFMA comment letter.

SIFMA Urges FINRA to Reconsider Extended Settlement Margin Proposal.

SIFMA expressed concern regarding a FINRA proposal to amend the application of margin requirements under FINRA Rule 4210 to "when issued" and other extended settlement transactions.

In its comment letter, SIFMA stated that FINRA's proposals are "so extensive" from an operational perspective for member firms and in terms of impact on customers and issuers that FINRA should consider "removing" the proposals and commencing a dialogue with members to better understand the impact of the proposal.

SIFMA urged a number of changes to the FINRA proposal, noting, among other things, that:

- FINRA should reconsider the distinction between IPOs and other types of when-issued offerings, stating that "extended settlement" in new issues is "generally driven by the financing terms/needs of the issuers or the logistical requirements of documenting the offering";
- the proposal to permit capital charges instead of margin collection for certain types of transactions may disadvantage smaller firms, which may not be able to participate in new issue offerings;
- most closing/settlement dates of non-equity/debt securities new issues are driven by various considerations unrelated to the ability or willingness of investors to pay and should not be considered "extensions of credit" as contemplated by margin regulations;
- the FINRA T+2 definition of "extended settlement" is inconsistent with Regulation T;
- it is not clear whether FINRA can impose margin requirements on municipal securities under Rule 4210; and
- the proposals should not apply to secondary market transactions, because bona fide delivery-versus-payment customers "are largely institutional investors of substantial size."

Cadwalader Wickersham & Taft LLP

May 18 2021

MSRB Seeks Comment on Amendments to Dealer Notification Requirements.

The MSRB requested comment on a rule amendment that would limit the annual customer notification required by MSRB Rule G-10 ("Delivery of Investor Brochure").

The MSRB is seeking feedback on limiting the persons to whom dealers would have to provide annual notifications to those who either (i) have effected municipal securities transactions during the past year or (ii) hold a municipal securities position. If amended, the rule would no longer mandate that a dealer make annual notifications to customers that do not, and might not ever, effect municipal securities transactions, so long as the annual notifications are available to such customers on the dealer's website.

Additionally, the MSRB proposed to amend MSRB Rule G-48 ("Transactions with Sophisticated Municipal Market Professionals") to except dealers from making Rule G-10 annual notifications to "sophisticated municipal market professionals" so long as the annual notifications are available to

such customers on the dealer's website.

Comments on the draft amendment must be submitted by June 28, 2021.

Cadwalader Wickersham & Taft LLP

May 17 2021

LSTA RFR Credit Agreements Are Here: LSTA publishes Daily SOFR (and Daily RFR) Concept Credit Agreements - McGuireWoods

On May 6, the LSTA published its long-awaited concept Daily SOFR and risk-free rate (**RFR**)-based multicurrency credit agreements (the **Concept RFR Documents**). The publication of these documents is a welcomed step in the transition from LIBOR These Concept RFR Documents illustrate various types of SOFR-based US Dollar credit facilities and RFR-based multicurrency credit facilities which use a daily, in arrears benchmark and have been prepared by the LSTA as educational tools for market participants. Four Concept RFR Documents have been published.

- A Daily Simple SOFR referenced credit agreement for a USD term loan facility. This credit agreement also includes alternative provisions for the use of a daily compounded SOFR interest rate where interest is calculated and applied daily to outstanding principal and accrued interest.
- A Daily Compounded SOFR referenced credit agreement for a term loan facility denominated in USD. Interest is calculated daily using the "compound the rate" approach where the interest is calculated using a compounding formula set out in the credit agreement.
- A multicurrency IBOR/RFR referenced credit agreement for a revolving loan facility (with optional drafting for a term loan facility) based on a simple interest calculation. This multicurrency credit agreement allows for borrowings denominated in USD, Euro, Japanese Yen, Sterling, Swiss Franc. It also provides an example for offering RFR-referenced loans for USD, Sterling and Swiss Franc denominated loans, but with EURIBOR-referenced loans for Euros and TIBOR-referenced loans for Yen.
- A multicurrency IBOR/RFR referenced credit agreement which provides for daily simple RFR referenced loans denominated in Sterling and Swiss Francs and USD LIBOR-referenced loans for Dollars, EURIBOR-referenced loans for Euros and TIBOR-referenced loans for Yen. It contains a mechanism for automatically transitioning to a spread-adjusted daily simple RFR (SOFR) or term RFR (SOFR) upon the occurrence of certain trigger events.

These four Concept RFR Documents are available to LSTA subscribers on the LSTA Library for the LIBOR Transition. Market participants are encouraged to familiarize themselves with the Concept RFR Documents.

Please contact any of the authors of this briefing or your regular McGuireWoods contact if you have questions about, or would like assistance with, the LIBOR transition.

By Donald A. Ensing, Susan Rodriguez, Jennifer J. Kafcas, Alvino S. van Schalkwyk & Harry Poland on May 17, 2021

McGuireWood LLP

BDA Files Letter on FINRA Margin Rule.

Continuing to provide lead advocacy, BDA today filed a comment letter on a FINRA proposal to amend FINRA Rule 4210 to apply to trades in when-issued securities with long delivery times. The changes generally specify that firms must collect margin for customers for trades in securities with settlement times longer than standard. Alternatively, firms can take capital charges in lieu of margin. There are several significant exceptions to the Rule. The current compliance implementation deadline for the Rule is October 24, 2021.

In our letter we argue that the Rule disadvantages regional and mid-size firms relative to bulge brackets because most mid-size firms customers do not have margin agreements in place, making collecting margin practically impossible. The capital charge provision helps, but regional firms generally have less capital than bulge brackets, to begin with, and these amendments place more demand on mid-size firms' limited capital than on large firms'. In addition, we argue for extending proposed exceptions for when-issued government and municipal securities to match issuer practices.

In addition to the current proposal on when-issued trades, FINRA has released a separate proposal to address margining for agency MBS with an extended settlement. BDA will comment separately on that initiative.

As always, please call or write if you have any questions.

Bond Dealers of America

May 14, 2021

F.B.I. Asking Questions After a Pension Fund Aimed High and Fell Short.

The Pennsylvania teachers' retirement fund put more than half its assets into risky alternative investments. The math didn't work out, spurring an investigation.

The search for high returns takes many pension funds far and wide, but the Pennsylvania teachers' fund went farther than most. It invested in trailer park chains, pistachio farms, pay phone systems for prison inmates — and, in a particularly bizarre twist, loans to Kurds trying to carve out their own homeland in northern Iraq.

Now the F.B.I. is on the case, investigating investment practices at the Pennsylvania Public School Employees' Retirement System, and new questions are emerging about how the fund's staff and consultants calculated returns.

The decisions that brought the fund to this point — the investigation is still in its early stages — are by now commonplace in the world of public pensions. Lawmakers years ago overpromised what the Pennsylvania fund would provide its members, even as the performance of its plain-vanilla stock and bond investments fell far short of what was necessary to deliver on those commitments.

Continue reading.

The New York Times

By Mary Williams Walsh

May 11, 2021

BDA Washington Weekly – Munis Back in Spotlight / MBFA's Virtual Fly-In

In a week in which Congress began to take definitive steps towards drafting infrastructure legislation, bipartisan talks began to fall apart, with a rise in corporate rates as a "red-line" for Congressional Republicans.

Just 4 days ago, a deal was realistically in sight. Leaders from both parties were set to meet with the President on Wednesday to discuss a compromise on infrastructure, and on Thursday a bipartisan working group Senate Committee Ranking Members was set to meet with Biden for a second time to work through original hiccups. However, following the Wednesday meeting, House Minority Leader Kevin McCarthy (R-CA) and Senate Minority Leader Mitch McConnell (R-KY) drew a red-line, announcing the deal would not proceed with any changes to the 2017 Tax Cuts and Jobs Act in which corporate rates were slashed to 21%.

As noted, a working group of 6 Republican Senators met with the President yesterday in the last ditch effort to find a compromise. While it's too early to call the meeting fruitless, hopes remain dashed after the meetings earlier in the week.

This week, the MBFA hosted a virtual fly-in to discuss muni financing in the context of infrastructure, meeting with senior Hill and Administration staff as the package continues to be debated. While bipartisan hopes are fading, a package is still in sight. With the budget reconciliation tool likely in play, the BDA expects this infrastructure spending package to be more than $2 trillion dollars, and likely will include many municipal bonds priorities.

More on the potential for muni legislation below.

****New BondingTime DC with John Godfrey of the American Public Power Association. We discuss infrastructure and muni investment, the Clean Energy for America Act, and the outlook for the remainder of 2021.**

The podcast can be found here.

Muni Watch:
House Hearing on Muni Financing Announced

Next week, the House Committee on Ways and Means is is hosting a hearing titled "Leveraging the Tax Code for Infrastructure Investment." The hearing will be hosted by the full Committee on Wednesday, May 19th – a sign that draft tax title legislation for the eventual infrastructure package should soon follow.

It is widely believed that BDA and MBFA priorities will be discussed extensively during the hearing, including:

- Restoration of tax-exempt advance refundings;

- Raise the BQ debt limit;
- Reinstatement of direct-pay bonds; and
- Expansion of PABs for ESG use.

A key point of the debate revolves around the American Infrastructure Bond Act, legislation that would reinstate a direct pay bond, similar to the Build America Bond. House legislation has much higher reimbursement rates but is subject to sequestration, while the Senate bill has a flat rate and is exempt from sequestration.

The BDA and the MBFA continue to press for this new product to be exempt from sequestration.

Through meetings with senior Hill and Administration staff during the MBFA virtual fly-in this week, we have learned that Hill Leadership is taking steps to ensure that prior to Memorial Day infrastructure legislative text will be introduced. While the House remains focused on passing the legislation by the July 4th holiday, many potential hiccups remain, especially considering how narrow the House majority is.

The Senate is expected to produce legislation in a similar timeline, however, many details are still influx on that side of the Capitol.

Bond Dealers of America

May 14, 2021

House Financial Services Municipal Bonds Market Hearing.

House Financial Services Subcommittee on Oversight and Investigations

Examining the Role of Municipal Bond Markets in Advancing and Undermining Economic, Racial and Social Justice

Wednesday, April 28, 2021

Witnesses

- William Fisher, Chief Executive Officer, Rice Capital Access Program
- Gary Hall, Partner and Head of Investment Banking (Infrastructure and Public Finance), Siebert Williams Shank & Co., LLC
- Chelsea McDaniel, Senior Fellow, Activest
- Jim Nadler, Chief Executive Officer, Kroll Bond Rating Agency
- Chris Parsons, Professor of Finance, University of Southern California

Opening Statements

Chairman Al Green (D-Texas)
In his opening statement, Green said the hearing will assess the municipal bond markets as a driver of discrimination and examine material disparities and the cost of capital raising for Historically Black Colleges and Universities (HBCUs). Green said this hearing will show how the municipal bond markets can also drive positive change and fiscal justice. He mentioned research that shows HBCUs,

on average, face higher fees when compared to similarly situated non-HBCUs. He said the disparities in fees were attributable to racial discrimination and that the cost disparities were magnified in states where anti-Black racial resentment is the most severe. Green said all of these findings are deeply personal and profoundly troubling and noted that he looks forward to discussing solutions.

Ranking Member Andy Barr (R-Ky.)
In his opening statement, Barr said the municipal bond markets provides a reliable source of capital and a stable avenue for investors to put their money to work for the public good. He added that the muni market is a strong way for issuers to finance their operations. He continued that the pandemic weighed on the economic wellbeing of states and localities as typical sources of revenue declined. To respond, he said Congress established the Municipal Liquidity Facility (MLF), and shortly thereafter, the muni market stabilized. Barr said everyone can agree our infrastructure needs improvement and that municipal bonds are a key source for financing those plans. He said significant tax increases would not help, rather we should look for ways to incentivize and mobilize private capital. Barr said he hopes to find a way to improve the municipal bond market and ensure equitable access for issuers, specifically highlighting the importance of restoring the ability of issuers to advance refund tax-exempt municipal debt. He said discrimination in the municipal bond market is illegal and should not occur, and hopes the Committee works to ensure this does not persist.

Testimony

William Fisher, Chief Executive Officer, Rice Capital Access Program
In his testimony, Fisher said HBCUs play a vital role in higher education that is not easily recognized or appreciated by the capital markets, and that the lack of understanding forces higher interest rates which cause investments in physical facilities, student support initiatives, and academic programs to suffer. He added that the negative impact of expensive debt impacts not only the institution and its students, but the local community as well. Fisher applauded the creation of the HBCU Capital Financing Program as a tool for providing access to low cost borrowing and creating a path to financial stability. He urged consideration of the HBCU Capital Financing Advisory Board's recommendations to increasing the borrowing capacity of the Program and expand the use of the program to include operating lines of credit. He said these provisions would further secure the HBCUs' "place" in America and higher education.

Gary Hall, Partner and Head of Investment Banking (Infrastructure and Public Finance), Siebert Williams Shank & Co., LLC
In his testimony, Hall explained his career in the municipal bonds market having served as an issuer, lawyer, and banker. He also emphasized his firms' and his personal longstanding connections with HBCUs as an alumnus, parent, and benefactor. He emphasized that municipal bonds are a critical funding source for infrastructure in America for bridges, roads, schools, health care facilities, higher education facilities, airports, and seaports our communities rely on. Hall also thanked the Congress for their decisive action in passing the CARES Act and authorizing the Federal Reserve's Municipal Liquidity Facility, stating that this swift action helped stabilize the tax-exempt market last March during a period of heightened market stress. Hall said that after decades of underinvestment, the entire U.S. faces an extraordinary infrastructure deficit, if which this trend continues, will only lead to additional delays of investment in and maintenance of critical public projects. He added that the " burden of crumbling infrastructure" will fall disproportionally on low-income and minority communities. While he raised questions regarding the data and methodology underpinning Parson's study, Hall added that there is certainly more that can be done to assist HBCUs with accessing the capital markets more cost-effectively going forward. Specifically, he noted SIFMA's support for authorizing triple tax exemption for HBCU-sponsored debt. Hall continued by outlining additional

SIFMA-supported policies that would help provide incentives to rebuild the nation's infrastructure such as: 1) preserving the tax exemption for interest earned by investors on state and local bonds; 2) reinstating the tax exemption on the advance refunding of municipal bonds; 3) expanding private activity bonds (PABs); 4) reinstating a direct pay bond program; and 5) expanding the small issuer exception so that states and municipalities have a variety of additional tools to finance their local projects. He commended the work of the Subcommittee and encouraged lawmakers to consider the previously suggested proposals. Hall concluded by commending the work of the Subcommittee, encouraging lawmakers to consider these proposals, and reiterating SIFMA's and its members' commitment to fostering not only a culture of diversity and inclusion within our industry, but also investing in diverse communities nationwide and increasing the availability of financing for critical local infrastructure projects.

Chelsea McDaniel, Senior Fellow, Activest

In her testimony, McDaniel said she plans to present a high level sectoral view of postsecondary education institutions in the context of the larger municipal finance market. She noted that as a result of longstanding policies born out of the segregation era, there have been social and environmental risks emerging within public entities, like local governments and schools. McDaniel stressed that these need to be updated. She continued by saying the cost of ignoring these fiscal justice risks is growing within government entities. She noted three examples of the growing materiality: predatory inclusion in higher education loans, outsized pricing among HBCU bonds, and postsecondary schools "racing" to become federally recognized Hispanic-Serving Institutions (HSIs) to capitalize off the growing Latinx student population. Finally, McDaniel said that from a credit perspective, Minority-Serving Institutions (MSIs) are much stronger municipal investments than Predominantly White Institutions (PWIs) and recommended three solutions to counter the fiscal justice risks in the postsecondary market: accounting for equity research, social justice bonds, and investment in physical assets.

Jim Nadler, Chief Executive Officer, Kroll Bond Rating Agency

In his testimony, Nadler began by saying ten years ago, some might have argued the last thing the world needed was another rating agency to serve the muni market. He said last summer, however, his agency achieved a milestone when the Federal Reserve deemed KBRA to be one of only four major rating agencies whose ratings could be used by issuers accessing the central banks emergency Municipal Liquidity Facility window. He commended Congress support in being integral to allow credit rating agencies to participate in government bond programs. Nadler continued that bond investors are increasingly interested in the social impact of their investments, and in the municipal bond market, investors need to understand how state and local government issuers plan to address economic, racial, and social justice within their communities. He supports efforts to improve the quality of disclosure on these topics from all levels of municipal government, as well as improving diversity and inclusion in municipal roles and recalibrating municipal responses to economic, racial and social justice issues. He added there is an increasing interest in thorough climate-related disclosures and he believes climate risk should be incorporated in all ratings where it is relevant. He concluded that municipal stakeholders will continue to drive decisions on changes that need to be made, and that analyzing municipal managers' responses to stakeholder preferences and the implications on credit is the role of a credit rating agency.

Chris Parsons, Professor of Finance, University of Southern California

In his testimony, Parsons said economists have long been interested in discrimination and racial disparities in wages, job placement, home ownership, mortgage rates, access to capital and dozens of other areas. He said the challenge is that comparing differences in average outcomes between groups by gender, race, and age may not always "paint a complete picture". He said studying municipal bonds, however, provides good insight into the issue. He explained that when you buy a

bond all that should matter is the financial return, and there is a well-accepted way of measuring an issuer's bond ratings. He asserted that his findings demonstrated that HBCUs pay 20 percent more in fees to underwriters, and that when HBCU-issued bonds are traded, it takes about 23 percent longer to find a willing buyer. Parsons concluded with one possible policy tool available to help remediate the challenges identified in his study: affording investors of HBCU-issued bonds tax exemption from state and local taxes. He said this policy would remove the tax disadvantages an investor living in, for example, New York or California currently faces when potentially investing in an HBCU-issued bond from another state.

Question & Answer
Discrimination Against Minority Serving Institution Issuers

Green asked witnesses if they believe these circumstances relating to HBCUs paying more on average than non-HBCUs indicates institutionalized discrimination. Parsons said the results of their findings are consistent with investors, not institutions and that their paper does not address that idea. McDaniel said it seems that way, judging by the outcomes of the studies. Fisher said yes, when discussing institutional investors. Hall said he has not studied that, and what he saw in the study with taste-based discrimination is not consistent with his experience in the marketplace and does not reflect the growth that has occurred since the study took place. He said he cannot conclude that there has been institutional racism.

Rep. Emanuel Cleaver (D-Mo.) asked witnesses if they believe socioeconomic factors like poverty, income inequality, and availability of affordable housing all factor in on a risk of a municipality and their ability to get significant bonding, or if race is not a factor at all. Hall said a lot of considerations are taken into fact when regarding the municipal bond market, but Socioeconomic background are not as important as is the economic power in terms of the tax base.

Rep. Alma Adams (D-N.C.) mentioned the data which showed HBCUs pay more to issue bonds than similarly-situated non-HBCUs. She asked how to quantify this cost in the years to come. Parsons said if the total cost is shown as 20-30 basis points, then it is in the hundreds of thousands of dollars and can be quantified a number of ways whether it represent a few professors or a few scholarships. He said he wanted their study to be able to look at the decisions to issue bonds that were not taken since every study is conditional on bonds that successfully went to the market. Parsons said no one can observe the cost to HBCUs that were not able to go to the market, and his intuition was that cost is significantly larger for those HBCUS.

Adams asked if there are solutions to address these fee disparities between HBCUs and non-HBCUs. Hall said the study mentions the notion of expanding the tax base for HBCUs, which SIFMA supports, by having triple tax exemption for HBCUs so that states who issue, like North Carolina, would be attractive to issuers in New York where the state income tax is high. Additionally, he suggested having a direct pay program similar to Build America bonds, allowing the HBCUs can access the taxable market, which has a wider investor base, thereby increasing the demand for HBCU bonds and closing their overall costs. McDaniel suggested looking at different factors that are not typically folded into the credit worthiness assessment of muni bonds.

Barr asked if provisions in the Investing in Our Communities Act would lower interest rates and help municipalities and issuers. Hall said yes, that the ability to refund existing debt with lower tax exempt debt is vital and needs to be reinstated.

Rep. Rashida Tliab (D-Mich.) said the Federal Reserve has been unwilling to facilitate meaningful emergency assistance for state and local governments and asked how Congress should step in to fill this gap and foster long term investments in communities. Parsons pointed to the findings with

HBCUs, and stated his support for the triple tax exemption as being “almost a free market solution to a problem”. He said the issue is the market is too small, and the exemption opens up the market to other states.

Credit Ratings and Evaluating Bond Deals

Barr asked what criteria goes into signing a bond and what factors are considered to be material. Nadler said materiality is key and when thinking about a bond rating and a credit rating you need to make sure what you are analyzing does have an impact on the fiscal health of that entity, whether it is a city or a state. Nadler said they found disclosure to be the most important aspect. He added there are other aspects that impact the liquidity of a bond moving forward that may not necessarily impact credit worthiness today but would still be interesting to investors. He supports more disclosures that align with investor preferences and give insight around liquidity.

Rep. Chuy Garcia (D-Ill.) said that much of what goes into credit ratings is outside of an issuers control, like if Puerto Rico was devastated by a hurricane, and noted that communities of color tend to be hit hardest by these shocks. He continued by asking if ratings firms consider criteria like this. Nadler said ratings firms do not do a good job of consideration. He said it is important to have competing ideas and enough research out there for investors. He added that rating agencies “get into a rut” and look at the same things every time, but should be reimagining cities and states as they grow and evolve.

Rep. David Kustoff (R-Tenn.) asked when evaluating a muni bond deal, what factors are the most important that impact the cost of capital for the issuer. Hall said they have to evaluate the credit underpinnings of the investor and the actual size of the issuance, and whether or not it would be very liquid in the market. He said that liquidity is an important factor as it relates to the resonance of the bond in the market and these are all taken into consideration when evaluating the risks.

Municipal Liquidity Facility (MLF)

Barr said he was surprised that after supporting the MLF, there was not as much uptake, and that throughout the pandemic the municipal bond market proved to be fairly resilient. Barr asked Nadler where he sees the bond market moving in the future, and if the state and local governments bailouts were really necessary on top of MLF. Nadler said they were also surprised by uptake as it relates to the committee and believed it had to do with how quickly muni market moved back to some normalcy. He said that although recovery has been great and faster than anticipated, there were structural issues prior to the pandemic that will be exacerbated and cause unevenness moving forward post-pandemic.

Rep. Sylvia Garcia (D-Texas) asked about the Municipal Facility saying it did not work, there were high penalty fees, and it initially excluded many Black cities in America. Garcia asked if it is still needed and what changes would need to be made. Hall said at the time the program was enacted, there were $500 billion allotted to the program, which is larger than the entire muni market. He said it was a “shock and awe” program to make sure investors knew the Fed was behind them in the muni bond market. Hall said after the MLF program came in, the muni bond market had the largest issuance during a month time span ever in history. He said the overall benefit to the marketplace was stability, but now the market is extremely resilient so it is not necessary, but having the ability to stand it up as an emergency back stop is important.

Importance of Muni Bonds

Kustoff asked about the importance of muni bonds as a tool for individuals in their financial planning and saving for retirement. Hall said these products give citizens the ability to invest in their own communities. As a long-term investment vehicle, he said muni bonds offer a significant return and that benefit is evident from the fact that over 50 percent of the market is held by “mom and pop

households."

Higher Education Issuances
Kustoff also Hall what the market is like for higher education issuances and how that compares to other types of available debt in the market. Hall said key components of higher education is the size of the endowment, student mix, and different sources of revenues the institution has. He said there has been peak demand for social impact bonds in the current market, making higher education and even K-12 attractive investments.

Oversubscription
Rep. Michael San Nicholas (D-Guam) said he endorses a triple tax exemption status for HBCUs and mentioned another solution that would allow land grant institutions to classify as agencies with Federal backing similar to government sponsored enterprises, to help drive down interest costs. He asked what a typical oversubscription is that would be helpful. Hall said creating peak competition for bonds drives yields downwards. He said the good news is the market has had many regulatory changes, and one of the important features is the expanded inclusion of municipal advisors to have a defined fiduciary role. Hall said they are crucial to the underwriting process because when there is oversubscription, municipal advisors ask the underwriters to lower yields and reduce that subscription, which helps ensure oversubscription goes to the benefit of the issuer.

Public Banks
Tliab asked if a public bank would be more likely to consider other factors beyond profitability in issuing bonds compared with a private bond underwriter. McDaniel said yes, and an advantage is that muni banks allow cities to recapture the local tax revenues, keeping the money within the community. Parsons said public banks serve a role when the private markets are failing or struggling.

For more information on this hearing, please click here.

MBFA Meets with Key Hill and Administration Staff Promoting Muni Priorities.

The Municipal Bonds for America Council hosted a "virtual fly-in" for Steering Committee members over the past week. The meetings focused on municipal bonds in the context of infrastructure financing and proved productive as both Congress and the Administration have begun to take concrete steps towards the introduction of a massive infrastructure package.

The MBFA met with senior staff representing:

- U.S. Department of Transportation Office of Intergovernmental Affairs
- Senator Debbie Stabenow (D-MI)-Member of Senate Finance Committee
- House Ways and Means Minority Tax Counsel
- Rep. Brad Schneider (D-IL)-Member of House Committee on Ways and Means

The recent introduction of the ***LIFT Act*** in the House and companion Senate bills helped to guide the conversations, however, the conversations went beyond the legislation and included:

- Restoration of tax-exempt advance refundings;
- Expansion of PABs including ESG;
- Raising the BQ debt limit; and
- Reinstatement of direct-pay bonds exempt from sequestration.

This event is part of the ongoing MBFA effort to ensure Congress includes municipal bond financing in any federal infrastructure package. We plan to host future fly-ins as legislation continues to progress, including in-person events in DC.

If you would like to get more involved with the MBFA, please contact Brett Bolton at brettbolton@munibondsforamerica.org

Bond Dealers of America

May 14, 2021

Accelerating the Settlement Cycle: SIFMA

Leading the Move to T+1

Accelerating the settlement cycle, as we all know from experience, is a complex and significant undertaking.

Working closely with members and other key stakeholders, SIFMA is collaborating with ICI and DTCC to outline key steps to shorten the cycle for secondary market transactions, identifying priority issues that need to be addressed and conducting the necessary due diligence and resolution of these critical issues. Discussions with our members began last year and we aim to complete this analysis on next steps to achieving T+1 by the end of Q3 2021. Shortly after that work, we will develop a definitive timeframe for moving to T+1. In addition to efforts to shorten the settlement time, we will assess what it may take to further accelerate the settlement cycle beyond T+1 and explore the role that emerging technologies could play.

Learn more about this important initiative:

- Blog Post: A Shorter Settlement Cycle: T+1 Will Benefit Investors and Market Participant Firms by Reducing Systemic and Operational Risks
- Press Release: SIFMA, ICI and DTCC Leading Effort to Shorten US Securities Settlement Cycle to T+1
- Video: Accelerating Settlement: A Conversation with SIFMA and DTCC

SEC's Amended Advertising Rules for Investment Advisers: Compliance Date Countdown Begins - Day Pitney

The U.S. Securities and Exchange Commission's (SEC) amended Marketing Rule became effective on May 4, 2021, kicking off the 18-month countdown to the November 4, 2022 compliance date. All investment advisers registered or required to be registered with the SEC will be required to conduct their advertising and solicitation activities in compliance with the amended rule no later than the compliance date. The Marketing Rule is a substantial revision of Rule 206(4)-1 under the Investment Advisers Act of 1940, as amended (the Advisers Act), commonly referred to as the advertising rule, which incorporates elements of former Rule 206(4)-3 (the cash solicitation rule, which has been repealed) to create a single unified rule that modernizes the regulatory framework for advertising and solicitation practices conducted by SEC-registered investment advisers.

The new Marketing Rule reflects advances in technology, changes in investor expectations and diversification of the investment industry over the past 60 years. Specifically, the new Marketing Rule:

- Updates how advertisements are defined
- Removes the current per se prohibitions and replaces them with seven general principles covering all advertisements
- Identifies standards for performance information and track-record presentations
- Covers not only advisory clients but also investors in private funds
- Permits testimonials and endorsements for which cash and noncash compensation is received

Because the Marketing Rule integrates prior SEC no-action letters and staff guidance with respect to the old advertising and cash solicitation rules, the SEC is expected to withdraw those superseded no-action letters and other prior staff guidance at the end of the implementation period. The SEC is maintaining a list of Marketing Compliance Frequently Asked Questions here, which we expect will be updated over the next year and a half as investment advisers grapple with the challenges of drafting policies and procedures in order to comply with the Marketing Rule. It is important to note that while an adviser may come into compliance with the Marketing Rule at any time after May 4, 2021, compliance is an "all or nothing" proposition. Phased-in compliance is not an option.

What Is an Advertisement?

Under the new Marketing Rule, the definition of "advertisement" includes two prongs, which capture the types of communications previously covered by the advertising and cash solicitation rules.

Offering Investment Advisory Services

The first prong of the new definition of advertisement includes any direct or indirect communication an investment adviser makes to more than one person, or to one or more persons if the communication includes hypothetical performance, that either

- offers the adviser's investment advisory services with regard to securities to prospective clients or investors in a private fund advised by the investment adviser or
- offers new investment advisory services with regard to securities to current clients or investors in a private fund managed by the investment adviser.

The scope of what constitutes an advertisement under this first prong is limited by a few notable exclusions, including the following communications, which are excluded from the definition of advertisement: (i) extemporaneous, live, oral communications; (ii) information contained in statutory or regulatory notices, filings, or other required communications; (iii) communications that include hypothetical performance that is provided in response to an unsolicited request for such information; or (iv) a communication that includes hypothetical performance that is provided to a prospective or current private fund investor in one-on-one communications.

Compensated Testimonials and Endorsements

The second prong of the new definition of advertisement draws from the old cash solicitation rule by encompassing any endorsements or testimonials for which an investment adviser directly or indirectly pays cash or noncash compensation (e.g., directed brokerage, awards, gifts, referrals, reduced advisory fees or fee waivers).

An endorsement is defined as being any statement that either (i) indicates approval or support, (ii)

directly or indirectly solicits a client to be the adviser's client, or (iii) refers any client to a private fund managed by the investment adviser. The definition of a testimonial includes statements made by a current client or investor in a private fund that (i) is about a client experience, (ii) directly or indirectly solicits any client to become a client of a private fund, or (iii) refers any client to the private fund. Compensated endorsements and testimonials will satisfy the definition of advertisement whether the communication is made orally or otherwise to one or more persons.

Testimonials and Endorsements Are Now Permitted

The new Marketing Rule permits the use of testimonials and endorsements, subject to compliance with the following four conditions:

Disclosure: The investment adviser must clearly and prominently disclose or have a reasonable belief that the person giving the testimonial or endorsement will disclose (i) that the testimonial was given by a current client or investor (or by a person other than a current client or investor); (ii) whether cash or noncash compensation was provided, and the material terms of the compensation arrangement; and (iii) any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the adviser's relationship with such person and/or the compensation arrangement. In a departure from the old cash solicitation rule, the new Marketing Rule does not require the promoter or solicitor to deliver a written disclosure document to the client if an endorsement or testimonial is given orally or to obtain a signed and dated acknowledgment from the client confirming receipt of the required disclosures. In another departure from the old cash solicitation rule, these disclosures may be made by either the investment adviser or the solicitor. However, if the adviser is relying on the promoter to disclose the required information, the adviser may want to consider retaining the traditional written disclosure system as a best practice.

Written Agreement: The adviser must have a written agreement with any promoter or solicitor providing a testimonial or endorsement that describes the scope of the agreed-upon activities and the terms of compensation for the activities; however, no written agreement is needed where the promoter is an affiliated person of the adviser or if the promoter receives minimal or no compensation (i.e., under $1,000 or the equivalent value in noncash compensation during the preceding 12 months).

Disqualification: An investment adviser must not compensate a person for a testimonial or an endorsement if the adviser knows or should know that the person giving the statement is an "ineligible person" at the time the statement is disseminated. A person is ineligible if he/she is subject to any disqualifying SEC action or disqualifying event. Actions that occurred prior to the effective date of the Marketing Rule will not disqualify a promoter, provided that the action would not have disqualified such person under the former cash solicitation rule. A disqualifying SEC action includes an SEC opinion or order barring, suspending or prohibiting a person from acting in any capacity under the federal securities laws. A disqualifying event includes certain criminal convictions and orders, including those of other governmental agencies, such as the Commodity Futures Trading Commission, that occurred within 10 years prior to the person's disseminating a testimonial or endorsement.

Oversight: The investment adviser must have a reasonable basis for believing that the testimonial or endorsement complies with the Marketing Rule. The written agreement requirement is part of the investment adviser's oversight and compliance obligations, but it does not by itself establish a reasonable belief of compliance. We recommend that advisers adopt policies and procedures that are reasonably designed to monitor compliance with the Marketing Rule.

Exemptions From Certain Requirements for Testimonials and Endorsements

De Minimis Compensation: A testimonial or endorsement for no compensation or for compensation not exceeding $1,000 will be exempt from the written agreement requirement and the disqualification provisions, but the investment adviser must comply with the disclosure and oversight requirements.

Affiliated Persons of Adviser: An adviser's partners, officers, directors, employees and affiliates, and such affiliates' respective partners, officers, directors and employees, are not required to comply with the disclosure or written agreement requirements, but the investment adviser must comply with the oversight and disqualification requirements.

Broker-dealers: A testimonial or endorsement from a broker-dealer making a recommendation pursuant to Regulation Best Interest or to a non-retail customer as defined by Regulation Best Interest does not need to comply with certain disclosure requirements and will be exempt from the disqualification requirements if the broker is not subject to statutory disqualification under Section 3(a)(39) of the Securities Exchange Act of 1934. However, the written agreement and oversight requirements apply.

Third-Party Ratings

The new Marketing Rule permits the use of third-party ratings in an advertisement, provided that the adviser has conducted certain diligence pertaining to the preparation of the rating and provides disclosure to assist a potential client in evaluating the rating. A third-party rating is defined in the Marketing Rule as a rating or ranking of an adviser provided by a person who is not a related person of the adviser and who is in the business of providing rankings or ratings. The adviser is required to have a reasonable basis for believing that any questionnaire or survey used in connection with obtaining the rating was fair. A survey's methodology will be considered fair when it is structured in a way that makes it equally easy for a participant to provide either favorable or unfavorable responses. In addition, the investment adviser must clearly disclose (i) the date on which the rating was provided and the time period on which the rating was based, (ii) the identity of the third party who created the rating, and, if applicable, (iii) any compensation paid by the adviser to the person creating the rating. Such disclosure must be at least as prominent as the third-party rating itself.

Performance Advertising/Track Record or Predecessor Performance

The Marketing Rule renders general guidance for the use of gross, net, hypothetical, related and extracted performance information by investment advisers. Performance results must include performance information for one-, five- and 10-year periods with equal prominence; however, investment advisers to private funds are exempt from the time period requirements.

Gross Performance and Net Performance

Gross performance should not be used unless net performance is presented with at least equal prominence and in a format designed to easily compare it to net performance. In addition, net performance must be calculated over the same time period as gross performance and with the same calculation methodology.

Hypothetical Performance

In a significant change from prior SEC guidance, hypothetical performance is permitted, provided that the adviser (i) adopts and implements procedures reasonably designed to ensure that the performance is relevant to the likely financial situation and investment objectives of the intended audience and (ii) provides certain information underlying the hypothetical performance, including

the criteria used and assumptions made in curating such specific performance data and the risks and limitations of using and relying on hypothetical performance data.

Extracted Performance

Using performance results of a subset of a portfolio is allowed only if the adviser provides (or promptly makes available) the performance results of the total portfolio.

Related Performance

Performance results cannot be cherry-picked from portfolios. Advisers must include performance results from all related portfolios with investment policies, objectives and strategies substantially similar to those being offered in the advertisement (unless the excluded related performance information would not result in materially higher performance results and does not alter the presentation of any time periods).

Track Record or Predecessor Performance

Predecessor performance (or track records from a prior firm or portfolio) are prohibited in advertisements, except in limited circumstances. First, the information must be derived from the adviser's directly managed account at a prior firm. Second, the prior account must have been sufficiently similar to the present account in a relevant way that makes the extrapolation fair. If there were other accounts managed by the adviser in a substantially similar manner, these accounts must also be included in the advertisement. Finally, the advertisement must contain all relevant disclosures, including that the performance results displayed are from and were achieved for a prior entity.

An investment adviser may use predecessor performance only if the predecessor and current investment advisers are appropriately similar with regard to their personnel and accounts and the advertisement has other relevant disclosures required under the Marketing Rule. In addition, the adviser must have access to the books and records attributable to the predecessor performance and must be able to provide them if the SEC requests such books and records.

Prohibition on Statements Regarding SEC Approval of Performance Results

Advertisements cannot include any language, express or implied, that the calculation or presentation of performance results in the advertisement has been reviewed or approved by the SEC.

General Prohibitions Under the New Marketing Rule

The Marketing Rule expands upon the existing blanket prohibition against advertisements containing any untrue, misleading or false statements of material facts with a new, more detailed principles-based approach. The new approach features seven broadly prohibited practices. An investment adviser may not disseminate any advertisement that

i) makes an untrue statement of a material fact or omits a material fact necessary to make the statement not misleading;

ii) makes a material statement of fact that the investment adviser does not have a reasonable basis for believing it will be able to substantiate;

iii) includes information that would be reasonably likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact;

iv) discusses any potential benefits without providing fair and balanced treatment of any associated material risks or limitations;

v) references specific investment advice provided by the investment adviser that is not presented in a fair and balanced manner;

vi) includes or excludes performance results or presents performance time periods in a manner that is not fair and balanced; or

vii) includes information that is otherwise materially misleading.

These categories draw broadly from historic fiduciary duty and anti-fraud principles. The prohibitions generally apply to any statements that could mislead clients through untrue or material misstatements or those which are not presented in a fair and balanced manner, and they prohibit including them in advertisements.

Other Changes

In connection with the Marketing Rule, the SEC made corresponding amendments to the Books and Records Rule (Rule 204-2 under the Advisers Act) and to Form ADV. Under the amendments to the Books and Records Rule, advisers will be required to maintain more detailed documentation regarding their advertisements and their arrangements for testimonials and endorsements. Form ADV will require advisers to respond to questions regarding their marketing practices, specifically whether the adviser's advertisements contain performance results, hypothetical performance, testimonials, endorsements or third-party ratings, and whether the adviser provides compensation in connection with the use of testimonials, endorsements or third-party ratings.

Day Pitney Alert

by Erik A. Bergman, Peter J. Bilfield, Eliza Sporn Fromberg & Joty Mondal

May 5, 2021

Muni-Bond Investors Need Straight Talk About Climate-Change Risk.

Most municipal-bond issuers aren't discussing their vulnerability to the environment and the SEC should make them

In February, the Security and Exchange Commission's acting chair directed its Division of Corporate Finance to enhance climate-related disclosures by public companies. The acting chair has also appointed a senior policy adviser for Climate and ESG — a new role at the agency.

While much of the SEC's efforts in increasing climate-related risk disclosures will focus on publicly traded corporations, the $4 trillion municipal bond market is equally important for the agency to address. These bonds typically have maturities of 15- to 30 years — long enough for the material risks of climate change to impact municipal cash flows. Furthermore, municipal bonds trade infrequently, so it is difficult for investors to sell these positions at reasonable prices if adverse climate events actually occur.

Yet current disclosures on climate-related risks are minimal by most municipal bond issuers, even

those that have recently experienced severe flooding and wildfires. Therefore, the SEC should work together with the Municipal Securities Rulemaking Board (MSRB) to require more extensive disclosures on the material climate risks of municipal bonds as well as the efforts by municipal issuers to mitigate these risks.

Since municipal bonds typically have long maturities, they are highly vulnerable to adverse changes in climate changes, even if they do not materialize for a decade or longer. Much of the revenue underlying these bonds comes from infrastructure projects and commercial properties, which are likely to be impacted by severe climate events. Yet, unlike many public companies, municipal issuers cannot easily respond to these climate risks by moving their facilities to higher ground or cooler geographies.

Most purchasers of municipal bonds own them until maturity. That's why municipal bonds are generally considered to be a "buy-and-hold" market. For example, a 2012 study conducted by the SEC found that about 99% of outstanding municipal securities did not trade on any given day in 2011. Because municipal bonds are not actively traded, they often do not have publicly quoted prices — which makes them difficult to price accurately.

Municipal bonds are extremely popular with retail investors because the interest paid on these bonds is generally exempt both from federal- and state income taxes. Municipal bonds are particularly attractive to retail investors in states with high income-tax rates such as California and New York. The biggest holders of municipal bonds are mutual funds catering to individual investors — such as the Vanguard Group of mutual funds, with more than $200 billion in municipal bonds.

Retail investors are attracted to municipal bonds not only because of their tax exemptions but also because of their low default rates. Over the decade ending in 2018, the average default rate for investment-grade bonds was 0.10%, as compared with a default rate of 2.28% for corporate bonds with similar ratings. Nevertheless, a 2019 analysis by investment firm BlackRock concluded that, if emissions of warming gases were not controlled over the next decade, more than 15% of the current S&P National Municipal Bond Index would be tied to metropolitan areas likely to suffer material economic losses from climate change.

Given the low liquidity and long maturities of municipal bonds, full disclosure of climate-related risks is crucial for preventing unsophisticated retail investors from becoming locked into bonds vulnerable to climate change. Yet offering documents for municipal bond issuers currently contain low levels of climate-related risk disclosures.

Examining 590 U.S. counties with populations over 100,000, a recent Brookings Institution study found that the offering statements of just 10.5% of municipal revenue bonds mentioned climate change. Yet these bonds are based on revenues from specific physical projects — such as tunnels, roads and treatment facilities — that would likely suffer from adverse climate events. Even worse, the Brookings study found that only 3.8% of general obligation municipal bonds mentioned climate change. But most municipalities issuing these bonds derive the bulk of their revenues from taxes on real estate, whose value would materially decline in the event of more hurricanes or wildfires.

Consider the revenue bonds issued in 2020 by the City of Phoenix Improvement Corporation, maturing in 2045. The offering statements for these bonds do not mention risks related to "climate change", "drought" or "heat". Yet Phoenix, Ariz. is already hot, and is one of the fastest-warming big cities in the US. According to a study from Climate Central, the average number of 100-degree days per year for Phoenix will increase to 132 by 2050 — likely leading to a water crisis.

One consequence of these low disclosure levels is that municipal bond markets aren't pricing in

climate-related risk. For example, compare the municipal bonds recently issued by Middletown Unified School District and Red Bluff Unified Elementary School, both in California. Both bonds mature in 2048 with AA ratings and similar pricing. Yet the risk of serious property damage from wildfires is more than five times higher in Middletown than in Red Bluff.

In response to the increased attention to climate risk, rating agencies have been moving in the right direction by publishing reports on how they are factoring climate risk into their assessment of the long-term financial position of municipalities. These reports have focused on the ability of municipal issuers to absorb the fiscal shocks caused by damages and lost revenues related to climate events. However, these are complex issues for the rating agencies to solve alone, due to the long-term nature of the problem and the lack of reliable data.

To enhance climate-risk disclosures, the SEC should amend its rules for underwriters of municipal bonds to require more detailed information on past climate events and the probabilities of future climate events. Such amendments should win support from the Government Finance Officers Association, which has recently recommended that local governments develop better disclosures about the primary environmental risks applicable to municipal bonds.

Since many municipal issuers have already experienced severe hurricanes, wildfires and other weather-related events, they can easily estimate the private and public damages imposed by such events as well as the costs of any preventive measures already taken. The latter would include the building of sea walls, the construction of carbon capture facilities and the adoption of any strategies to reduce greenhouse gas emissions.

Disclosures on adverse climate events in the future are more challenging. Since climate models do not typically produce an exact result, the offering statements for municipal bonds should contain a range of likely scenarios along with their probabilities of occurring. For each scenario, investors should be told about the scope of the adverse climate events and their impact on the assets supporting the municipal bonds — the dedicated assets for a revenue bond and the tax base for a general obligation bond.

In addition, to facilitate searches on climate risks and comparisons among municipal issuers, the MSRB should require that all offering statements for municipal bonds be filed in a singular, machine-readable format. At present, analysts must pull climate risks by hand from these disclosure documents.

Addressing the risks posed by climate change to municipal bonds should be a high priority for the SEC under the Biden administration. Given the illiquidity and long duration of municipal bonds, it is critical for investors that the SEC enhance the disclosures on climate risk in the municipal bond market.

MarketWatch

By Robert C. Pozen

March 30, 2021

SEC Should Force Municipal Issuers to Disclose Climate Risk, Says Former Fidelity President.

The SEC has taken action in recent months to increase public companies' disclosure of climate risk.

But no such movement exists in the long-term municipal bond market, despite being particularly exposed to climate risk.

Robert C. Pozen, Senior Lecturer at MIT and former president of Fidelity Investments, writes at MarketWatch:

> Current disclosures on climate-related risks are minimal by most municipal bond issuers, even those that have recently experienced severe flooding and wildfires. Therefore, the SEC should work together with the Municipal Securities Rulemaking Board (MSRB) to require more extensive disclosures on the material climate risks of municipal bonds as well as the efforts by municipal issuers to mitigate these risks.
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by CivMetrics Staff | Apr 21, 2021

SIFMA Amicus Brief: BofI Holdings, Inc. v. Houston Municipal Employees Pension System

SUMMARY

Court:
U.S. Supreme Court (pet. for writ of cert.)

Amicus Issue:
Whether unsubstantiated public allegations about an issuer or its business, without any additional corroborating disclosure or event, reveal to an efficient market the 'truth' for purposes of establishing loss causation under Dura (as held by the Sixth and Ninth Circuits, in direct conflict with the Eleventh Circuit).

Counsel of Record:
Simpson Thacher & Bartlett LLP

Jonathan K. Youngwood
Craig S. Waldman
Joshua Polster
Daniel Owsley

Other Amici:
U.S. Chamber of Commerce

Read the Amicus Brief.

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You can now take the public finance conversation to a whole new level by joining GFOA's new Member Communities. Ready to start a conversation? GFOA active government members can login now using their GFOA username and password.

ACCESS COMMUNITIES

What Happens When the Recently Enacted NY LIBOR Statute Meets the Trust Indenture Act?

Many corporate trustees have been concerned about what happens when the U.S. Dollar LIBOR ("LIBOR") cessation finally occurs (now set for June 30, 2023 for 1-month, 3-month, 6-month and 12-month USD LIBOR settings, among others). There appeared to be some relief on April 6, 2021 when LIBOR legislation was signed into law in New York state (the "NY LIBOR Legislation"), which is designed to facilitate a smooth transition to alternative benchmark rates. Promulgation of the NY LIBOR Legislation was motivated by uncertainty surrounding the future of some $223 trillion in contracts and financial products pegged to LIBOR as of the end of 2020, many of which are governed by New York law and do not contain fallback provisions to transition to an alternate

benchmark upon the cessation of LIBOR.

While the NY LIBOR Legislation, on its face, appears to be an effective stopgap measure, the Trust Indenture Act of 1939 (the "TIA"), specifically Section 316(b) of the TIA, raises questions about the enforceability of the NY LIBOR Legislation under the TIA. Specifically, although the NY LIBOR Legislation provides some clarity for indenture trustees who are troubled about governing documents, including indentures, that are silent about LIBOR cessation, the NY LIBOR Legislation simultaneously triggers concerns under TIA Section 316(b), reminiscent of some of the issues highlighted in the 2017 decision of the Second Circuit Court of Appeals in *Marblegate Asset Management, LLC v. Education Management Finance Corp. ("Marblegate").*

In broad terms, the NY LIBOR Legislation provides that, in the case of many New York law-governed contracts that reference LIBOR and that do not have adequate fallback provisions to determine what happens when LIBOR ceases ("Legacy Contracts"), a new "benchmark rate" recommended by the appropriate authorities (e.g., the Secured Overnight Financing Rate ("SOFR")) will, by operation of law, be used for such contracts in lieu of LIBOR.

Since New York law governs a majority of corporate indentures, as well as many other financing documents, the NY LIBOR Legislation will have a broad impact and cover many underlying securities and financings. In the case of indentures qualified under the TIA (and, to an extent, indentures which are not so qualified for private placement issues or municipal bonds, both of which often incorporate the TIA to varying degrees), TIA Section 316(b) provides that "the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security … shall not be impaired or affected without the consent of such holder." Accordingly, if bondholders or other parties to financings are negatively impacted by the rate change (to SOFR or otherwise) under the NY LIBOR Legislation and challenge such a change as a violation of Section 316(b) (or the 316(b) analogous language), it is far from clear that the NY LIBOR Legislation would survive the challenge.

The New York City Bar Association (the "NYCBA") issued a report supporting the NY LIBOR Legislation, in which it commented on the TIA issue. The NYCBA acknowledged the issue, supporting a minor amendment to the TIA and concluding that "… whether or not the TIA is amended … New York should proceed with a legislative solution that can be applied to the many transactions not subject to the TIA."

The well-documented judicial record of prejudiced and disgruntled bondholders that seek, with some success, to be made whole through litigation is a prominent source of anxiety for issuers and corporate trustees related to LIBOR's phase-out. This is reminiscent of *Marblegate*, as well as other cases which speak to the required consent of affected bondholders, where the issue of changes to bond terms without bondholder consent was relevant. While the Second Circuit Court of Appeals ultimately ruled against the bondholders objecting to changes in *Marblegate*, a recent New York case (*CNH Diversified Opportunities Master Account, L.P. v. Cleveland Unlimited, Inc. ("CNH"))*, arguably created contrary precedent for unhappy bondholders to convince a court that an amendment or transaction violated their rights as creditors or was unlawful under state or federal law, notwithstanding the *Marblegate* ruling. It remains unsettled, perhaps to be further clarified by a court, whether *CNH* has indeed created an opportunity for such bondholders. In any case, even though the NY LIBOR Legislation presents different issues under Section 316(b) than were involved in *Marblegate* and *CNH*, the mere mention of Section 316(b) and how it may be interpreted by the courts in relation to LIBOR will be of concern to indenture trustees.

Presumably, New York lawmakers had TIA Section 316(b), *Marblegate* and *CNH* in mind when drafting the New York LIBOR Legislation; hence the legislation's "Safe Harbor Provision."

Specifically, the Safe Harbor Provision provides that no person shall have any liability arising out of the use of a recommended benchmark replacement or the implementation of benchmark replacement conforming changes. That said, it remains to be seen how, or if, the Safe Harbor Provision would apply to a dispute arising under the TIA and if the Safe Harbor Provision will adequately protect corporate trust banks acting as trustees and agents.

Accordingly, while the NY LIBOR Legislation provides some comfort, federal statutes such as the TIA might provide bondholders with an avenue to object should they feel aggrieved. Other considerations under federal law, such as the contracts clause of the U.S. Constitution (which prohibits states from passing laws impairing contract obligations), also exist but are beyond the scope of our focus here.

The NY LIBOR Legislation provides relief only for Legacy Contracts governed by the law of New York. A significant number of contracts, including indentures, however, are governed by the laws of other jurisdictions. Due to the existence of Legacy Contracts governed by laws other than those of New York, support for a federal statute mimicking the language and effect of the NY LIBOR Legislation is gaining momentum. On April 14, 2021, major financial industry groups, including the Securities Industry and Financial Markets Association, the Structured Finance Association and the American Bankers Association submitted a joint letter to the United States House of Representatives Committee on Financial Services, calling for the passage of a federal statute achieving the same end as the NY LIBOR Legislation. Consequently, there may be more issues for corporate trust banks to consider. Both the NY LIBOR Legislation and a potential federal statute are, without question, of paramount importance to corporate trustees and may affect risk assessment and the scope of review of transactional documents. As always, the corporate trust community should remain vigilant.

Thompson Hine LLP – Irving C. Apar and Yesenia D. Batista

April 30 2021

Questions about GFOA's New Member Communities?

We've put together a number of resources to help you navigate GFOA's new Member Communities. Click the link below for helpful FAQs and how-to videos.

LEARN MORE

MSRB Par Value Report.

Par value traded in the municipal bond market decreased more than 40% in Q1 2021 compared to the same period in 2020.

See all the stats.

Why It's Time To Investigate The Wisconsin Public Finance Authority.

For some time I have been critical of this regional Wisconsin Public Finance Authority that has taken on the role of willing issuer for bonds anywhere in the United States. I don't know what its motivation was in presuming such a prominent role in the municipal bond market, but professionalism and expertise are certainly not what comes to mind. They have no dedicated professional staff and its board members experience show no particular skill in evaluating the bonds they approve. In fact, if what they review is no more than what the MSRB receives and post on the EMMA system, then they would have little or nothing substantial to evaluate.

I don't know how many of these out-of-state bond issues they have approved, but I do know that so far, some 23 issues totaling $1.9 billion have defaulted or are in distress with 19 of them occurring in 2020-2021. No other issuer, never mind state, comes even close to this number. In fact, during this time period I recorded 130 distress/defaults on $9 billion of debt. Hence, this one small regional authority accounts for 14.6% of the number of distressed or defaulted issues (or 20.5% of the dollar amount) during the last 13 months.

Most of these defaults are in the retirement and health care area, a type of bond that has historically had the worst default track record. All the more reason then for added scrutiny. A common element for the Wisconsin bonds is that there is little or no information in terms of audited financial statements or official statements. We know that audited financial disclosure has not been a requirement of the authority. Its website advertises its services and makes no pretense at providing anything more than a rubber stamp.

I understand that they took on this nationwide authorization authority at the behest of a financial institution. Just four counties and a city that decided they had a calling. Aside from the abuse we see here, there is a huge infringement on the rights of each state to police the issuance of bond debt for project within its borders. There are also caps on the volume of tax-exempt issues that represents a quota that a state has a right to allocate.

There is also a responsibility to bond buyers who show a great deal of trust in the municipal market despite the fraud and abuse we have seen over the years. It is for these and other reasons that the MSRB, SEC, Congress and state securities regulators should look into this, starting with the state of Wisconsin.

Forbes

by Richard Lehmann

Apr 29, 2021

Earth Day: Municipal Bond Climate Change Disclosure Update

Climate Change Disclosures are Growing in Importance, Writes BB&K's Mrunal Shah in PublicCEO

In recent years, bond investors have increasingly demanded information on environmental disclosure, including climate change, social and governance (ESG) disclosure. With such increased demand by bond investors, public agencies have also increasingly disclosed climate-related change and risks. However, no consistent framework exists for such disclosure. California's state leadership set out to learn more about this ever-evolving topic and tasked the California Debt & Investment Advisory Commission to conduct a study to learn more.

The Study's Findings
The study analyzed content in over 200 official statements of enterprise revenue bonds issued between 2016 and 2019 to understand how California's municipal bond issuers are disclosing the risks in climate change. The results of the Commission's study can be found in the "Climate Change Disclosure Amount California Enterprise Issuers." The study found that, despite growing expectations to report climate risk, most issuers in the study did not mention climate change in their disclosure documents. Robust disclosures were notably linked to issuance size and high-frequency issuers. Geography was also a major factor, finding coastal counties and urban counties tended to include more thorough disclosure than inland and rural areas. The Commission's report also found that, of the 39 counties in the report sample, 14 did not mention any disclosure of climate change.

Regulatory Focus
The Securities and Exchange Commission has increased its focus on ESG as it has increasingly become a priority for investors. On March 15, the SEC's Division of Corporate Finance invited public input on a number of ESG disclosure-related considerations in an effort to evaluate its current disclosure rules. While the Division of Corporate Finance does not govern municipal securities, its actions and guidelines could provide useful insight for municipal bond issuers. In a public statement issued in conjunction with the SEC's request for public input, Acting Chair of the SEC Division of Corporate Finance Allison Herren Lee stated "[s]ince 2010, investor demand for, and company disclosure of information about, climate change risks, impacts, and opportunities has grown dramatically…Consequently, questions arise about whether climate change disclosures adequately inform investors about known material risks, uncertainties, impacts, and opportunities, and whether greater consistency could be achieved."

Why Disclosure is Important
When offering securities to the public, municipalities have an obligation to disclose information so potential purchasers can make informed investment decisions. From California's fire-ravaged towns to Texas' devastating winter storms, some state municipalities are on the forefront of dramatic global climate change impacts.

In 2020 alone, the west coast was significantly impacted by wildfires, including five of the top 10 largest wildfires in California history. It is estimated the damage caused by the 2020 wildfire season will have a direct cost of over $20 billion, not including indirect costs such as insurance hikes and loss of revenue. According to the Dallas News, damages from the Texas freeze is estimated to have damages of approximately $155 billion due to crop losses, power outages, water disruption and infrastructure loss.

Although projected effects of climate change have received increased media attention in recent years, consideration of climate change in disclosure documents is a relatively new and evolving expectation. However, depending on the type of security being issued, such risks maybe material to potential investors. Municipal issuers should evaluate their current practice related to disclosure of climate risk to investors to ensure that such risks and uncertainties are being completely and accurately disclosed. Additionally, issuers should develop best practices for monitoring the ever-changing impacts of climate change and plan for disclosure of such risks for future issuances.

Municipal issuers should also be aware that disclosure of such risks may be utilized outside of the context of issuance of securities. According to the Commission's study, a climate change disclosure – or lack thereof – became the focus of litigation in 2018 by ExxonMobil against a group of California cities and counties that had filed suit against the company for future damages from sea-level rise and coastal flooding due to greenhouse gas emissions from fossil fuel products sold by the company. ExxonMobil countered that the public agency claims were not made in good faith because these climate-related issues were not included in the cities' and counties' bond disclosures. While litigation

did not move forward, it prompted public agencies to review and disclose climate change risk in their offering documents.

Best Best & Krieger LLP

April 23, 2021

MSRB Holds Quarterly Virtual Board Meeting.

Washington, DC – The municipal market's self-regulatory organization held its quarterly Board of Directors meeting virtually on April 21-22, 2021. The Municipal Securities Rulemaking Board (MSRB) continued to consider and discuss input from its public request for comment on strategic priorities and stakeholder interviews as it progresses with developing a new organizational vision and long-term strategic direction. The Board anticipates adopting a strategic plan this fiscal year that will guide the organization for several years beginning in Fiscal Year 2022.

"Planning for the future of the municipal securities market requires grappling with the pressing issues of today," said MSRB CEO Mark Kim. "Our Board recognizes that the municipal securities market can play an important role in being part of the solution for advancing a more just and equitable society."

The Board discussed recent initiatives of market participants and financial regulators to promote transparency around Environmental, Social and Governance (ESG) factors in the municipal market.

"Our market is beginning to establish best practices for ESG disclosure, and we are seeing ESG designations and scoring systems gain traction," Kim said. "We are committed to leveraging our EMMA website to enhance the transparency and accessibility of ESG data and information." The MSRB's Electronic Municipal Market Access (EMMA®) website serves as the free central repository for municipal market disclosures and trade data.

The Board also discussed the steps it will take to align the EMMA website and other MSRB resources with the Government Accounting Standards Board (GASB) proposal to rename the Comprehensive Annual Financial Report due to the similarities in the common pronunciation of the acronym to a racially offensive term in South Africa.

Retrospective Rule Review

The Board regularly revisits existing rules to determine that they continue to achieve their intended purpose of enhancing market fairness and efficiency. The Board voted to begin a retrospective review of MSRB Rule G-10, on investor and municipal advisory client education and protection. The MSRB will publish a request for comment on potential amendments that aim to reduce unnecessary compliance burdens imposed on dealers by providing additional clarity about which customers should receive the required annual notifications.

Also at its meeting, the Board revisited a 2018 provision of MSRB Rule G-34, which was amended to address a regulatory disparity by extending the obligation to apply for CUSIP numbers in a competitive transaction on which they advise from dealer municipal advisors to all municipal advisors. The Board had previously planned to rescind the requirement for all municipal advisors, dealers and non-dealers alike. However, since the rule has been fully implemented in firms' processes for several years and has proven to enhance market efficiency by ensuring CUSIP

numbers are obtained at the earliest stage in a competitive deal, the Board determined to maintain the rule in its current form.

The Board voted to file with the Securities and Exchange Commission (SEC) housekeeping amendments to MSRB Rule A-8 to update or remove outdated descriptions of the Board's procedures related to rulemaking.

Systems Modernization

Lastly, the Board received an update on ongoing efforts to leverage cloud technology to modernize the MSRB's critical market transparency systems and improve the quality and utility of market data for all market participants.

"The MSRB takes its responsibility seriously to provide the public with valuable data that shines a light on municipal market trends that can have far-reaching effects on communities nationwide," Kim said. "Our investment in the cloud is enabling us to improve the quality of data and develop powerful analytical tools to answer the market's currently unanswerable questions."

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Date: April 23, 2021

Contact: Leah Szarek, Chief External Relations Officer
202-838-1500
lszarek@msrb.org

GASB Proposes to Rename the Comprehensive Annual Financial Report.

Norwalk, CT, April 13, 2021 — The Governmental Accounting Standards Board (GASB) today proposed to change the "comprehensive annual financial report" to the "annual comprehensive financial report."

The proposed name change was prompted by GASB stakeholders raising concerns that the existing acronym for the report, when spoken, sounds like a profoundly offensive term. After seeking input from various stakeholder groups, the Board added a project to its current technical agenda in December 2020 to address those concerns.

The Exposure Draft (ED), *The Annual Comprehensive Financial Report*, proposes to eliminate both the financial report name and the offensive acronym from the GASB's standards, though it is important to note that no changes have been proposed to the structure or content of the report.

Regarding the issuance of the ED, GASB Chair Joel Black said, "When you pronounce the acronym, it is a highly offensive racial slur directed toward Black South Africans. As we and our stakeholders are part of a global community, we do not wish to be offensive to anyone, so we have undertaken the project to address this."

Stakeholders are asked to review the proposal and provide input to the Board by July 9, 2021. More information about commenting on the ED can be found in the document, which is available on the GASB website, www.gasb.org.

FINRA Proposes Amendments to Margin Requirement Rules.

The proposed amendments could significantly alter the landscape for extended settlement of securities offerings by expressly limiting the public offering exception for "whenissued" securities to equity IPOs

Key Points:

The proposed amendments:

- Define an "extended settlement transaction" as any transaction that is agreed to settle beyond T+2 and require all such transactions to be margined as though they were transacted in margin accounts
- Expressly narrow the scope of the current "primary distribution" exception for "when issued" securities to only apply to equity IPOs, and thus exclude public or "Rule 144A" offerings of debt securities, as well as follow-on or exchange offerings of equity securities
- Extend the exception whereby member firms can choose to take capital charges for any net mark to market loss on transactions in when-issued securities in "designated accounts" to the broader category of "exempt accounts" (which includes certain institutional investors), foreign broker-dealers, and DVP/RVP accounts

The Financial Industry Regulatory Authority (FINRA) has proposed amendments to its margin requirement rules, which protect member firms against customer credit risk by generally requiring firms to collect margin when they extend credit to their customers.

The proposed amendments would deem any transaction that is agreed to settle beyond T+2 an "extended settlement transaction" for which margin must be collected as if in a margin account, absent an applicable exception. The proposed amendments would also expressly limit the public offering exception for when-issued securities in cash accounts to equity IPOs. This change could significantly impact existing market practice for registered offerings of debt, as well as private offerings resold under Rule 144A. Furthermore, due to increased negative carry in debt refinancings, as well as delays in the launch of offerings that cause issuers to miss attractive market windows (as T+2 is insufficient to prepare the requisite closing documentation for many debt financings without a strong running start), the amendments could likely increase the cost of capital for issuers in the US capital markets. The authors of this Client Alert also believe the proposed amendments could cause member firms to be forced to take additional capital charges in order to allow transaction professionals (including the member firms themselves, as well as attorneys, auditors, trustees, and issuers) a sufficient amount of time to finalize the requisite closing documentation. The cost will either be borne by firms or passed through to issuers.

Background

T+2 Settlement Cycle

A settlement cycle for a securities transaction begins at the date of the contract to enter into a securities transaction (commonly referred to as the "trade date" or "T") and ends when both the

“payment of funds” and the “delivery of securities” have occurred between the transacting parties. Rule 15c6-1(a) of the Securities Exchange Act of 1934 (the Exchange Act) requires the settlement cycle to take place within two days (commonly referred to as “T+2”) “unless otherwise expressly agreed to by the parties at the time of the transaction.”1 Accordingly, although the default requirement is that settlement take place within two business days, such period can be extended by agreement between the transacting parties.

Regulation T

Regulation T (Reg T), adopted by the Federal Reserve pursuant to Section 7 of the Exchange Act, regulates the securities credit activity of broker-dealers. As part of such regulation, Reg T specifically sets forth the periods of time in which a broker-dealer is required to (i) obtain cash payment from its customer in relation to a securities purchase in a cash account and (ii) have its customer post margin to cure a margin deficiency in a margin account. Reg T seeks to limit the exposure to market risk by broker-dealers in the event of delays beyond the normal settlement cycle by requiring either the cash payment or the posting of margin in lieu thereof to take place within one “payment period” of the date of purchase.2 “Payment period” is defined as “the number of business days in the standard securities settlement cycle in the United States, as defined in paragraph (a) of SEC Rule 15c6–1 [T+2], plus two business days.”3 Reg T thus requires broker-dealers to secure from their customers payment in cash accounts or margin in margin accounts, within four business days of trade date (T+4). Reg T provides certain limited exceptions to this requirement in certain situations, including, with respect to purchases of when-issued securities and “delivery against payment” transactions in cash accounts.

With respect to when-issued securities, in cash accounts, Reg T requires full cash payment within one “payment period” of the date the security “was made available by the issuer for delivery to purchasers.”4 Accordingly, in a cash account, a customer is not required to make payment within four days (T+4) after the purchase transaction is executed, but rather four days after the issuance or distribution of a when- issued security. With respect to “delivery against payment” transactions, the broker-dealer has up to 35 calendar days (T+35) to obtain payment “if the security is delayed due to mechanics of the transaction and is not related to the customer’s willingness to pay.”

FINRA Rule 4210

FINRA Rule 4210 builds on the requirements of Reg T to impose further requirements on FINRA member broker-dealers with respect to their credit activities, including the treatment of when-issued securities transactions. As a general matter, FINRA Rule 4210 requires when-issued transactions to be treated as if the securities were issued on the trade date in both cash and margin accounts. However, FINRA Rule 4210 provides certain limited exceptions to this requirement with respect to cash accounts. Specifically, rather than obtaining cash payment, broker-dealers can choose to take capital charges for any net mark to market loss on transactions or net positions in when issued securities in cash accounts of FINRA members or “designated accounts.”5 Additionally, neither margin nor capital charge requirements apply to when-issued securities in cash accounts when the securities “are the subject of a primary distribution in connection with a bona fide offering by the issuer to the general public for cash.”6 Finally, the current rule states that “the amount of margin … required by any provision of [Rule 4210] shall be obtained as promptly as possible and in any event within 15 business days from the date such deficiency occurred.”7

As a practical matter, the industry has viewed the current rule as permitting extended settlements in certain situations involving when issued securities. The exception for primary distributions to the general public has been widely viewed as applying to all registered offerings, including debt offerings, and has even been extended in some cases to Rule 144A offerings.

Proposed Amendments to FINRA Rule 4210

Definition of "Extended Settlement Transaction"

In the proposed amendments, FINRA brings clarity on a fundamental level to the question of when a broker-dealer is required to obtain margin in this context by introducing a definition of "extended settlement transaction." Under the proposed new FINRA Rule 4210(a)(18), "extended settlement transaction" is defined as:

"any contract for the purchase or sale of a security (including any exempted security) that does not provide for the payment of funds by the customer (in the case of a customer purchase) or delivery of securities by the customer (in the case of a customer sale) by the second business day after the date of the contract."

In turn, the proposed rule would expressly require all extended settlement transactions to be margined as though they were in margin accounts, except for specifically excepted transactions. In explaining the application of the definition, FINRA highlights that a transaction in relation to which a firm accepted in good faith a customer's agreement to pay within T+2 but for which the customer was only able to make payment on T+3 due to an unexpected issue would not be an extended settlement transaction. FINRA states, however, that if settlement within T+3 is agreed to in advance or if the firm does not have a good- faith belief in settlement in T+2 the transaction would be an extended settlement transaction. Accordingly, the proposed rule would make clear that firms are not able to rely on the additional two-day cure period afforded by Reg T for payment in cash accounts or margin in margin accounts unless the firm accepted in good faith the customer's agreement to pay in T+2 and payment was delayed up to an additional two business days due to unforeseen circumstances.

When-Issued Securities Transactions

Restriction of Public Offering Exception to Equity IPOs

As noted above, under the current rule, neither margin nor capital charge requirements apply to when- issued securities in cash accounts when the securities "are the subject of a primary distribution in connection with a bona fide offering by the issuer to the general public for cash."8 The proposed amendments would expressly narrow the scope of this exception to only apply to equity IPOs and thus exclude when-issued transactions in debt securities and secondary follow-on or exchange offerings of equity securities. In the release, FINRA acknowledges that certain firms have interpreted this provision more broadly to additionally capture these types of offerings, but states that its original intention with the exception was to only exclude equity IPOs and that the proposed amendments clarify that original intention.9

Ironically, while FINRA's proposal would exclude equity IPOs from the default requirement, equity IPOs (and other common stock offerings) for US issuers are among the offerings least likely to use an alternative settlement cycle. The existing computer systems used for equity trading are generally unable to accommodate extended settlement of an equity IPO. When extended settlement is used in common stock offerings, it is typically due to timing constraints imposed by foreign law (including requirements for delivery of "wet ink" signatures) and the practicalities of cross-border offerings.

However, FINRA's proposal could cause a substantial change in market practice for primary distributions of debt offerings. Due to the volume of documentation to be completed between the pricing and closing of those offerings,10 market practice for the vast majority of high-yield debt is a settlement cycle of T+4 to T+6. Similarly, a significant volume of investment grade and convertible

debt offerings settle between T+3 and T+5. Movement to a T+2 settlement cycle could result in delayed launches (due to a need to get more documentation into place prior to pricing), as well as increased negative carry by issuers when they issue new debt prior to completion of a redemption notice period or completion of a tender offer. Unfortunately, this change could eliminate much of the benefit provided by the Securities and Exchange Commission's (SEC's) recent relief on debt tender offers that permitted "five business day" tender offers to allow issuers and investors to better align settlement and funding dates; that synchronization requires at least a T+5 settlement cycle for an offering that prices on the day of launch. The use of a T+2 settlement cycle may also be problematic for acquisition financings, as practical realities (and regulatory approvals) necessitate additional notice periods prior to selecting a closing date (and a failed offering often results in a funded bridge loan, which cannot be documented in such a short period of time).

New Exceptions for US Treasury and Municipal Securities

FINRA acknowledges in the release that the public offering exception historically has been interpreted by firms to except new issuances of US Treasury securities and municipal securities and, based on its belief that these transactions present low risks relative to other non-equity offerings, proposes new exceptions to avoid disruptions to these markets. The new exceptions would specifically allow for settlement within T+14 for new issuances of US Treasury securities and T+42 for new issuances of municipal securities.

Allowing for Capital Charges in Lieu of Payment in Cash Accounts for Exempt Accounts, Non-Member Broker-Dealers, and Bona Fide DVP Customers

As noted above, under the current rule, firms can choose to take capital charges for any net mark-to-market loss on transactions or net positions in when-issued securities in cash accounts of FINRA members or "designated accounts" rather than obtain cash payment.11 The proposed amendment would extend this exception to "exempt accounts," an existing definition under the current rule that includes designated accounts, non-member broker-dealers (including foreign broker-dealers), and certain institutional investors that (i) have a net worth of at least US$45 million, (ii) have assets of at least US$40 million, and (iii) make available certain information through public filings or otherwise regarding ownership, business operations, and financial condition. The proposed amendment would also present this option to firms for "bona fide DVP customers," a new definition that would capture customers with whom the firm has a delivery versus payment (DVP) /receive versus payment (RVP) arrangement that satisfies the requirements of FINRA Rule 11860.

Other Changes

The proposed amendments would make certain other clarifications and changes, including by introducing certain new specific extended settlement transaction categories in relation to which the margin requirement may be delayed for certain periods of time.

Takeaways

The regulation of extended settlement transactions has long been a murky and arcane area, and clarity is welcome. However, if the proposed amendments are adopted as proposed, they could significantly change the practical settlement landscape. There are a number of situations in which extended settlements are a necessary and important structural mechanism and, while the proposed amendments create some useful bright lines, there remain many commonplace situations that practically require extended settlement. For example, many cross-border offerings are practically impossible to implement without extended settlement. Moreover, while firms do have the option to take a capital charge in lieu of collecting margin in certain situations, this option could lead to an

increase in the cost of capital, which will either be borne by member firms or passed on to issuers.

While the proposed amendments seek to clarify FINRA's views on margin requirements, the policy needs for such action are worth considering further. That is: Is the credit risk mitigation that FINRA is seeking to achieve worth the inevitable increase in the cost of capital and the difficulties that shorter settlement of certain offerings will cause?

Comments on the proposed amendments must be submitted to FINRA by May 14, 2021.

Latham & Watkins LLP – Senet S. Bischoff, Gregory P. Rodgers, Stephen P. Wink and Naim Culhaci

April 13 2021

Firm Settles FINRA Charges for Placing "Throw-Away" Bids.

A firm settled FINRA charges for placing bids that were well under market value in response to bid-wanted auctions or requests for quotes ("RFQs") in municipal securities. As a result of this action, the firm was found to have failed to exercise its best judgment in determining the fair market value ("FMV") of the securities.

In a Letter of Acceptance, Waiver and Consent, FINRA found that after the firm responded to the RFQs and the below-FMV bids had been accepted, the firm then re-offered the bonds at significantly higher prices "consistent with independent market activity" (i.e., the re-offer price aligned with previously reported trades in the bonds). FINRA stated there was no market news to justify the spread between the firm's bid to the issuer and its re-offer prices. The firm was found in violation of MSRB Rules G-13 ("Quotations Relating to Municipal Securities") and G-17 ("Conduct of Municipal Securities and Municipal Advisory Activities").

Additionally, FINRA found the firm had no written supervisory procedures ("WSPs") that referenced MSRB Rule G-13, nor did the WSPs identify who was responsible for reviewing quotations in municipal securities. As a result, the firm was found in violation of MSRB Rule G-27 ("Supervision").

To settle the charges, the firm agreed to (i) a censure; (ii) a $80,000 fine ($40,000 for violations of MSRB Rules G-13 and G-17, and $40,000 for violations of MSRB Rule G-27); and (iii) an undertaking to revise its WSPs to remedy the relevant deficiencies.

Cadwalader Wickersham & Taft LLP

April 15 2021

The End of LIBOR: Transitioning to an Alternative Interest Rate - SIFMA Submission

SUMMARY

Submission for the Record by SIFMA before the U.S. House Committee on Financial Services Committee Subcommittee on Investor Protection, Entrepreneurship and Capital Markets in the

hearing: “The End of LIBOR: Transitioning to an Alternative Interest Rate Calculation for Mortgages, Student Loans, Business Borrowing, and Other Financial Products”

SIFMA believes that Federal legislative action is necessary to address the set of issues that we discuss further below in order to facilitate the smooth transition from LIBOR to alternative reference rates. In particular, there is a large stock of existing contracts and instruments that, as a practical matter, cannot be amended to utilize alternative rates.

SIFMA is supportive of Federal legislation aligned with recommendations from the Alternative Reference Rates Committee (“ARRC”) to address these situations where contracts cannot be easily transitioned from LIBOR due to legal or regulatory reasons. We believe such legislation would benefit all market participants including LIBOR’s end users, from investors to companies to consumers, and would provide four key benefits: (1) certainty of outcomes, (2) fairness and equality of outcomes, (3) avoidance of years of paralyzing litigation, and (4) preservation of liquidity and market resilience.

Read the SIFMA Testimony.

SIFMA: Joint Trades Letter on LIBOR Contracts

SUMMARY

SIFMA and the undersigned organizations write in support of federal legislation to address “tough legacy”contracts that utilize LIBOR. There are trillions of dollars of outstanding contracts, securities, and loans that use LIBOR for their interest rates but do not have appropriate contractual language to address a permanent cessation of US dollar LIBOR, which will occur in June 2023.

Existing interest rate fallback provisions may not address the issue at all, may result in adjustable-rate contracts becoming fixed-rate contracts based on the last known LIBOR, or may defer to a party’s judgement to replace LIBOR with a comparable interest rate index.

In any case, it is likely that ineffective or ambiguous fallback provisions will result in uncertainty, litigation, and harm to consumers, businesses, and investors.

Read the SIFMA letter.

Moving on from LIBOR (Update) - Squire Patton Boggs

Amid the world’s turmoil, we can take comfort in the persistent march of long-foretold events. Keeping to their pre-pandemic promises (at least partially), the Federal Reserve and U.K. regulators [1] of LIBOR have reaffirmed their plans to cease publication of the one-week and two-month LIBORs by the end of 2021. Issuers, holders, and counterparties are slowly and grudgingly waking up to this reality. How are they responding?

Continue Reading

By Johnny Hutchinson and Sandy MacLennan on April 15, 2021

Squire Patton Boggs

LIBOR Legislation Bill Passed by New York State Legislature: McGuireWoods

On March 24, 2021, the New York State legislature passed a Senate Bill (the **Bill**) regarding the discontinuation of USD LIBOR, which will cease in mid-2023. New York State Governor Andrew Cuomo signed the Bill into law on April 6, 2021.

The new law applies with respect contracts governed by New York law for which U.S. dollar LIBOR (**USD LIBOR**) is used as an interest rate benchmark. Similar to the version of the legislation that the ARRC originally proposed in March 2020, the final law, among other provisions, (i) prohibits a contract party from refusing to perform its contractual obligations or declaring a breach of contract as a result of LIBOR discontinuance or the use of the legislation's recommended benchmark replacement, (ii) establishes that the use of the ARRC-recommended benchmark replacement (which will be based on the Secured Overnight Financing Rate (or SOFR) is a commercially reasonable substitute for and a commercially substantial equivalent to LIBOR, and (iii) provides a safe harbor from litigation for the use of such ARRC-recommended benchmark replacement. The proposed legislation would not override existing contract language that specifies a non-LIBOR based rate as a fallback to LIBOR (e.g., the prime rate). For this reason, market participants have observed that the law may not have a significant impact on New York law-governed bilateral and syndicated business loans, which generally provide that if USD LIBOR is not available an alternate base rate (such as the prime rate or fed funds) will be used under such contract. In addition, because the law applies only to New York law-governed contracts referencing USD LIBOR, it will not affect contracts governed by the law of other states or countries or contracts referencing LIBOR for other currencies.

The law has been welcomed by market participants, as it reduces uncertainty and economic impacts surrounding the transition by providing a means of transitioning 'tough legacy' New York law contracts that do not include effective fallbacks.

The text of the legislation was presented by the ARRC in 2020, more details of which can be found in our earlier blog post. The ARRC have endorsed Governor Cuomo's decision to sign the legislation into law, labelling it a "critical step in facilitating a smooth transition away from LIBOR". It remains to be seen whether federal legislation will be adopted alongside this New York State legislation, though the introduction of a draft discussion bill to the U.S. Congress in October 2020 suggests that such legislation could progress over the course of 2021.

Please contact any of the authors of this briefing or your regular McGuireWoods contact if you have questions about, or would like assistance with, the LIBOR transition.

By Donald A. Ensing, Barlow T. Mann, Jennifer J. Kafcas, Alvino S. van Schalkwyk & Harry Poland

April 15, 2021

McGuireWoods LLP

The End of LIBOR: Transitioning to an Alternative Interest Rate Calculation for Mortgages, Student Loans, Business Borrowing, and Other Financial Products

Mark Van Der Weide, General Counsel

Before the Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, Committee on Financial Services, U.S. House of Representatives, Washington, D.C.

Chairman Sherman, Ranking Member Huizenga, and members of the subcommittee, thank you for the opportunity to appear today. My testimony will discuss the importance of ensuring a smooth, transparent, and fair transition away from LIBOR (formerly known as the London interbank offered rate) to more durable replacement rates, as well as some of the challenges posed by this transition. Before I delve into those issues, however, it may be helpful to review how LIBOR is used and why it will be discontinued.

LIBOR measures the average interest rate at which large banks can borrow in wholesale funding markets for different periods of time, ranging from overnight to one month, three months, and beyond. LIBOR is an unsecured rate that measures interest rates for borrowings that are made without collateral. Over the past few decades, LIBOR became a benchmark rate used to set interest rates for commercial loans, mortgages, derivatives, and many other products. In total, U.S. dollar LIBOR is used in more than $200 trillion of financial contracts worldwide.

By now the flaws of LIBOR are well documented.1 One of the fundamental problems is that LIBOR purported to be a representation of the actual funding costs of large banks in the London interbank market, but the evolution of that market over the years meant that, for many tenors, banks were estimating the likely cost of such funding rather than reporting the actual cost. This increasing element of subjectivity and discretion, coupled with the mechanisms that had been adopted to aggregate various banks' inputs into the determination of LIBOR, made the rate vulnerable to collusion and manipulation. Particularly after the global financial crisis of 2008, as banks sharply reduced their reliance on wholesale unsecured funding, there were few actual funding transactions on which to base a rate for many tenors of LIBOR.

While banks are, of course, not required to price their credit as a direct function of their cost of funding or on any amalgam of actual transaction data, the LIBOR mechanism—by purporting to be a measure of such costs even though there were not sufficient transactions to justify that perception—had become potentially misleading to many of those relying on it for credit pricing and other decisions. Over time, with a large number of contracts referencing a thinly traded rate, the incentive to manipulate LIBOR grew and actual manipulation of LIBOR abounded.

Following the exposure of these weaknesses, and the imposition of material legal penalties on a number of banks and individuals that engaged in misconduct related to the setting of LIBOR rates, the great majority of the banks that had provided submissions to be used in the setting of LIBOR (the so-called panel banks) determined that they would not continue participating in the process. This was not the result of a regulatory or legal requirement to end LIBOR. It was a private sector decision to stop providing what had always been a completely voluntary service, given the firms' assessment of the costs and benefits of doing so. While regulators are appropriately focusing on whether financial firms have prepared themselves for the date when the panel banks have said they will no longer provide LIBOR, the decision to end LIBOR itself has not been a governmental decision, but a private sector development.

Last month, LIBOR's regulator in the United Kingdom announced that the one-week and two-month U.S. dollar LIBOR term rates will cease to be published at the end of 2021, while overnight and other LIBOR term rates will cease to be published on a representative basis in mid-2023.2 This definitive announcement about the end of panel-based LIBOR underscores the importance of transitioning away from this moribund benchmark rate.

Efforts to Transition Away from LIBOR

Market participants, regulatory agencies, consumer groups, and other stakeholders have put in a great deal of work to prepare for life after LIBOR. Beginning in 2013, the domestic Financial Stability Oversight Council and the international Financial Stability Board expressed concern that the decline in unsecured short-term funding by banks could pose serious structural risks for unsecured benchmarks like LIBOR.3 To mitigate these risks and promote a smooth transition away from LIBOR, the Federal Reserve convened the Alternative Reference Rates Committee (ARRC) in November 2014. Recognizing that the private sector must drive this transition, the ARRC's voting members are private-sector firms. The Federal Reserve and the other agencies testifying today are ex-officio members of the ARRC.

The ARRC set about to identify alternative reference rates that were rooted in transactions from an active and robust underlying market. In June 2017, the ARRC identified the Secured Overnight Financing Rate (SOFR) as its recommended alternative to U.S. dollar LIBOR. SOFR is a broad measure of the cost of borrowing cash overnight, collateralized by Treasury securities. The Federal Reserve Bank of New York publishes SOFR each morning. Unlike LIBOR, SOFR is based on a market with a high volume of underlying transactions—regularly around $1 trillion daily. The ARRC developed a multi-step plan in October 2017 to facilitate the transition from LIBOR to SOFR.

The Federal Reserve and other agencies also sponsored a series of workshops with lenders and borrowers that focused on the use of credit-sensitive alternative reference rates for loans. Relatedly, the Federal Reserve, Office of the Comptroller of the Currency (OCC), and Federal Deposit Insurance Corporation (FDIC) issued a statement last year to emphasize that a bank may use any reference rate for its loans that the bank determines to be appropriate for its funding model and customer needs.4 The statement also noted, however, that a bank's loan contracts should include robust fallback language that provides for a clearly defined alternative reference rate to be used if the initial reference rate is discontinued.

Supervisory Efforts

Beginning in 2018, Federal Reserve staff began outreach to supervised institutions and examiners to raise awareness about, and encourage preparation for, the transition away from LIBOR. In 2019, we established a LIBOR Transition Working Group to coordinate monitoring of the transition and develop supervisory plans to assess banks' preparation efforts.

In November 2020, the Federal Reserve, OCC, and FDIC sent a letter to the banking organizations that we regulate, noting that there are safety and soundness risks associated with the continued use of U.S. dollar LIBOR in new transactions after 2021.5 Accordingly, we have encouraged supervised entities to stop using LIBOR in new contracts as soon as practicable and, in any event, by the end of this year. Federal Reserve Vice Chair for Supervision Randal Quarles emphasized in a recent speech that banking firms should be aware of the intense supervisory focus the Federal Reserve is placing on the LIBOR transition, and especially on plans to end issuance of new LIBOR contracts by year--.6

Legacy Contracts

A key question is whether existing LIBOR-based contracts (legacy contracts) can seamlessly transition to alternative reference rates when LIBOR ends. The ARRC recently estimated that 35

percent of legacy contracts will not mature before mid-2023. Some of these legacy contracts have workable fallback language to address the end of LIBOR, but others do not. For example, most business loans have workable fallback language—by their terms, business loans generally fall back to an alternative floating rate, such as the prime rate. Similarly, most derivatives are governed by a master agreement published by the International Swaps and Derivatives Association (ISDA), and ISDA has published a "protocol" that allows derivative counterparties to amend their master agreements, on a multilateral basis, so that their derivative contracts fall back to a floating SOFR-based rate for counterparties that adhere to the protocol. Conversely, many floating-rate notes and securitizations have problematic fallback language—generally, these contracts convert to fixed-rate instruments at the last published value of LIBOR. Moreover, the rate terms in floating-rate notes and securitizations can typically be changed only with the unanimous consent of all noteholders, which typically would be difficult to secure.

The end of LIBOR may result in significant litigation. For example, if a legacy contract converts to a fixed rate when LIBOR ends, a party disadvantaged by that conversion might request that a court reform the contract by substituting an alternative floating rate for LIBOR.7 Parties also might request that a court reform or void a legacy contract that lacks any fallback language if the parties cannot agree bilaterally on a successor rate.8 Similarly, in instances where a legacy contract allows a person to select a replacement rate when LIBOR ends, a party disadvantaged by the replacement rate might argue that the manner in which another person—for example, a bond trustee—selected the replacement rate violates the implied covenant of good faith and fair dealing.9

Chair Powell and Vice Chair Quarles have publicly stated their support for federal legislation to mitigate risks related to legacy contracts. Federal legislation would establish a clear and uniform framework, on a nationwide basis, for replacing LIBOR in legacy contracts that do not provide for an appropriate fallback rate.10 Federal legislation should be targeted narrowly to address legacy contracts that have no fallback language, that have fallback language referring to LIBOR or to a poll of banks, or that convert to fixed-rate instruments. Federal legislation should not affect legacy contracts with fallbacks to another floating rate, nor should federal legislation dictate that market participants must use any particular benchmark rate in future contracts. Finally, to avoid conflict of laws problems, federal legislation should pre-empt any outstanding state legislation on legacy LIBOR contracts.

Thank you. I look forward to your questions on this important matter.

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1. Jerome H. Powell, Reforming U.S. Dollar LIBOR: The Path Forward (speech at the Money Marketeers of New York University, New York, NY, September 4, 2017).

2. See https://www.fca.org.uk/news/press-releases/announcements-end-libor.

3. See Financial Stability Oversight Council, 2013 Annual Report (Washington: Department of the Treasury, 2013); and Financial Stability Board, Reforming Major Interest Rate Benchmarks (Basel, Switzerland: Financial Stability Board, July 2014).

4. SR letter 20-25: Interagency Statement – Reference Rates for Loans.

5. SR letter 20-27: Interagency Statement on LIBOR Transition.

6. Randal K. Quarles, Keynote Remarks (speech via webcast at the SOFR Symposium, New York, NY, March 22, 2021). See also SR letter 21-7: Assessing Supervised Institutions' Plans to Transition

Away from the Use of the LIBOR.

7. An aggrieved party might cite a variety of common law doctrines to justify judicial reformation, including mutual mistake, impracticability, and frustration of purpose. Although each of these doctrines sets a high bar for voiding or reforming contracts, it is difficult to predict how courts might rule on a contract-by-contract basis.

8. Again, parties might cite a variety of common law doctrines, including mutual mistake, impracticability, and frustration of purpose.

9. This covenant, which is implied in all contracts, generally embraces a pledge that neither party will do anything that has the effect of destroying or injuring the right of the other party to receive the fruits of the contract. See, e.g., ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 228-9 (N.Y. 2011).

10. The New York State Legislature recently enacted legislation that is intended to mitigate risks related to legacy LIBOR contracts, but that bill would apply only to contracts governed by New York law.

April 15, 2021

SIFMA: The Need for Federal Legislation in the Transition Away from LIBOR

On March 5, ICE Benchmark Administration confirmed its cessation plan for LIBOR. Most non-U.S. Dollar LIBOR tenors will cease on December 31, 2021. To provide a smoother transition for legacy instruments, U.S. Dollar denominated LIBOR, the largest and most important tenors of LIBOR, cessation will occur on June 30, 2023. LIBOR has a definitive end date, and regulators are demanding in no uncertain terms that their regulated institutions to move away from LIBOR this year.

There are undoubtedly certain issues requiring legislative action to guide the transition away from LIBOR to alternative reference rates. In particular, there is a large stock of existing contracts and instruments that as a practical matter cannot be amended to utilize alternative rates. SIFMA is supportive of Federal legislation aligned with recommendations from the Alternative Reference Rates Committee, or ARRC, to address these situations where contracts cannot be easily transitioned away from LIBOR due to legal or regulatory reasons.

We believe such legislation would benefit all market participants including LIBOR's end users, from investors to companies to consumers, and would provide four key benefits: (1) certainty of outcomes, (2) fairness and equality of outcomes, (3) avoidance of years of paralyzing litigation, and (4) preservation of liquidity and market resilience.

Continue reading.

April 13, 2021

SIFMA Podcast: The Need for Federal Legislation in the LIBOR Transition

In the latest in SIFMA's podcast series, SIFMA president and CEO Kenneth E. Bentsen, Jr. is joined by Chis Killian, SIFMA managing director, securitization and credit, to talk about the need for Federal legislation in the transition away from LIBOR.

SIFMA is supportive of Federal legislation aligned with recommendations from the Alternative Reference Rates Committee to address these situations where contracts cannot be easily transitioned from LIBOR due to legal or regulatory reasons. We believe such legislation would benefit all market participants including LIBOR's end users, from investors to companies to consumers, and would provide four key benefits: (1) certainty of outcomes, (2) fairness and equality of outcomes, (3) avoidance of years of paralyzing litigation, and (4) preservation of liquidity and market resilience.

Transcript

Edited for clarity

[Ken Bentsen] Thank you for joining us for this episode in SIFMA's podcast series. I'm Ken Bentsen, SIFMA's president and CEO. I'm joined today by my colleague, Chris Killian, SIFMA managing director, securitization and credit, for a conversation on the transition away from LIBOR and, in particular, the need for federal legislation to aid that transition.

SIFMA has been engaged on this issue for seven years, since the Alternative Reference Rate Committee, or ARRC, began working on a replacement for LIBOR in the United States. It's a priority for both the industry and the official sector. Chris, can you give us the current state of play?

[Chris Killian] To start, LIBOR is referenced in approximately $223 trillion of financial products. And it's a very shaky foundation because LIBOR is intended to measure interbank lending costs, but those transactions upon which LIBOR is supposed to be based have dwindled in numbers over the years as financial markets and bank-funding models have evolved. Much of today's LIBOR submissions is derived from estimates of transactions and not actual transactions.

So global regulators saw the problem with placing the foundation for global financial markets on this sort of construct nearly 10 years ago, and they began to examine how more-robust alternative reference rates could be identified or developed to replace LIBOR. Since then, and really ramping up in 2017, the key message from the regulatory community has been and continues to be that LIBOR isn't suitable and that market participants must transition to alternative reference rates.

The ARRC, which SIFMA is a member of, identified SOFR as the preferred alternative to LIBOR. In contrast to LIBOR, SOFR is fully transaction-based, referencing the previous day's activity in the repurchase markets, which are very liquid and very active — such that SOFR is based on approximately a trillion dollars of daily transactions that come from a wide range of market participants. And SOFR is administered and published by the New York Fed.

What's clear is that LIBOR is going away. There's no doubt about that. In December, there were finalizations [on] proposals from the administrator of LIBOR and the FCA in the U.K., which is its regulator, that most non-U.S. dollar LIBOR tenors will cease publication on December 31st of this year. The main U.S. dollar LIBOR tenors are going to cease on June 30th, 2023. And it's important to note two less used U.S. dollar LIBOR tenors will also cease at the end of this year, but the real deadline in the U.S. is June 2023.

[Chris Killian] Ken, here's a question for you: Of the $223 trillion in outstanding LIBOR transactions, the ARRC estimated that 67 percent of that would roll off by June 2023, which leaves about 74 trillion in LIBOR exposure that ends beyond June 2023. What happens to that exposure?

[Ken Bentsen] About $68 trillion of that is comprised of swaps, futures, and related transactions. And many but not all of those transactions can be amended and addressed by industry-wide protocols, such as the ISDA protocol, or by actions by clearinghouses to convert the outstanding positions.

But the remaining $6 trillion or so of exposures are comprised of various types of cash products: bonds, notes, loans, asset-backed securities, and other extensions of credit. The ARRC estimates that about $1.9 trillion of this is comprised of bonds and securitizations, which commonly do not have fallback provisions.

Many of these products were not designed at the time of issuance with a permanent cessation of LIBOR in mind, and in many cases these products are difficult or effectively impossible to amend due to regulatory constraints or practical issues, such as identifying all of the holders of a widely distributed security.

There are tens of thousands of floating-rate securitizations and corporate-bond transactions, and some of those contracts don't have fallbacks. More commonly, the fallback provisions would result in a floating-rate bond becoming a fixed-rate bond or other contracts' fallback to the judgment of an issuer, administrator, or other party.

In other words, from a practical standpoint, the existing fallbacks aren't effective. The outcome of a permanent cessation of LIBOR may frequently not be in line with the expectations of the issuers, investors or customers, and may lead to vast amounts of litigation that ties up courts for years and causes major disruptions in financial markets and with investor portfolios.

The ARRC has taken steps to address this in New York state, where many financial contracts, certainly not all, are governed by New York state law. Chris, do you want to talk about what was done there?

[Chris Killian] The legacy problem was clear to the ARRC, and the ARRC created a working group to look at options and develop recommendations for how to deal with these legacy transactions that we like to call "tough legacy transactions."

In March of 2021, the ARRC published a proposal for a statutory mechanism to address these ineffective tough legacy transaction fallback provisions, and what the legislation would do is it would create a statutory safe harbor from litigation and replace LIBOR-based fallbacks with those that are recommended by the ARRC, the Federal Reserve, or the New York Fed. And these would be based on SOFR.

The goals of the approach are manifold. One is to provide certainty of outcomes to contract participants. Another is to make sure that those outcomes are equal and fair across all of the market participants. And finally, ultimately this is being done to promote the liquidity and stability of financial markets.

Given that many financial contracts are governed by New York state law, the ARRC initially proposed this legislation in the state of New York. SIFMA supported it — supported the publication of the language and advocated for its passage in New York. And just a couple weeks ago, the New York Assembly and Senate passed legislation that's in line with the ARRC's recommendation on a

nearly unanimous vote, and the governor signed the bill. So, Ken, while the New York state legislation is a positive outcome and something we're very happy to see, we believe there's more to be done at the federal level. Can you talk about the reasons for why that is?

[Ken Bentsen] While, as you said, the New York legislation is quite useful in regard to New York-governed instruments or contracts, it's not a full solution for many of the instruments or contracts that are not governed by New York law or addressing such federal issues as the Trust Indenture Act, which is a key factor in this, as well.

Only federal legislation can apply a standard uniformly across all the states, and certainly only federal legislation can affect the Trust Indenture Act. A uniform federal law can promote the benefits provided by New York state for contract certainty, fairness, and equality in outcomes and avoid some litigation in market liquidity across the nation.

While certainly it's conceivable that 49 other states, plus other territories and jurisdictions like the District of Columbia, could attempt to enact similar legislation to New York, it's not really practical and would take a tremendous amount of time, definitely exceeding the period of time when LIBOR will cease to exist. So really, federal law is appropriate. And I might add: Given that the transition away from LIBOR is a federal public policy initiative and priority, it just underscores the need for federal legislation in and of itself.

In addition to this, I talked about the Trust Indenture Act being a federal statute. And the baseline of a trust indenture under the Trust Indenture Act requires unanimous consent to amend the document. In this case, the interest rate on the product. I might add – unless in the original contract, at that original point, that had been changed.

But in most cases, most of these contracts rely on the baseline unanimous consent. And that's not really practical because even if you could find all of the holders and get them to opine or take a position, you're not guaranteed that you would get 100 percent.

So federal legislation would provide narrow targeted relief that would allow contracts to transition to more-robust reference rates without having to deal with the really impossible hurdle of meeting unanimous consent requirements. And federal legislation could also ensure that there are not adverse tax or other consequences to issuers, holders, or consumers. In sum, federal legislation would offer a consistent outcome for all stakeholders and parties, and they would provide certainty about the outcome of the transition away from LIBOR.

And of course, lastly, federal legislation would help to avoid litigation gridlock, whether it's trustees seeking guidance from a court where it's not clear or various parties litigating over whatever fallback mechanism would be chosen without that certainty. And that's important not just to avoid unnecessary litigation but also to ensure market stability and liquidity.

Chris, obviously, a lot of work has been done over, really, the past seven years, since the formation of the ARRC. And then fast-forward 2017, with the establishment of SOFR, and now addressing these legacy contracts. What do you see next in terms of this? What's the status of potential federal legislation?

[Chris Killian] There was a hearing today, April 15th, in the subcommittee of the House Financial Services Committee, where legislation from Representative Brad Sherman, who's from California, was published and discussed. And the witnesses at the hearing were from federal regulators, like the Fed and the OCC and the Treasury.

The hearing, I think, was positive, and regulators expressed agreement with the need for federal legislation. And that legislation, hopefully, will expediently move through the congressional process because, despite the fact that the main U.S. dollar LIBOR tenors will be around until 2023, it takes a fair amount of time to implement changes.

In our mind, that legislation is something that needs to happen this year, as soon as it can. And that gives everybody ample time to change documents, update systems, be prepared to deal with different reference rates and all of those things that people need to do operationally and technically.

[Ken Bentsen] Great. Thank you, Chris. So, more to come. And I want to thank you for participating today, and also thank our listeners for tuning in to hear our views on this issue involving federal legislation and the transition away from LIBOR. To learn more about this issue and SIFMA and our various work to promote effective and resilient capital markets, please visit us at www.sifma.org. And thank you, again, for joining us.

April 19, 2021

Ken Bentsen is president and CEO of SIFMA and CEO of the Global Financial Markets Association.

Chris Killian is SIFMA managing director, securitization and credit

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MSRB Email Reminders for Recurring Financial Disclosures.

Read the MSRB publication.

S&P Credit FAQ: How S&P Global Ratings Thinks About LIBOR Risks In U.S. Public Finance

On March 5, 2021, the U.K. Financial Conduct Authority (FCA) announced the cessation of one-week and two-month U.S. dollar London Interbank Offered Rate (LIBOR) publication by ICE Benchmark Association (IBA) effective Jan. 1, 2022, followed by the cessation of overnight and 12-month LIBOR publication effective July 1, 2023. Although these announcements were expected, the 2023 date provides a longer time for issuers to prepare to transition their legacy contracts than was once anticipated.

Below, we answer some frequently asked questions regarding this announcement and the impact to U.S. public finance market participants

Frequently Asked Questions

How could this change affect a credit rating?

S&P Global Ratings' analysts continue to assess the financial exposure U.S. public finance (USPF) issuers could face due to financing and hedging transactions tied to LIBOR as well as management's preparedness to mitigate risks through proactive transitionary measures.

S&P Global Ratings' issuers need to remain mindful of the approaching deadline when considering and managing LIBOR-based debt instruments and derivatives by assessing potential exposure to

LIBOR across all obligations. Additionally, we believe sound credit quality hinges on management demonstrating a strategy for transitioning to an alternative benchmark, including assessing the financial exposures of replacing it and limiting exposure to basis risk throughout the transition.

Although many market participants have yet to work with their counterparties to identify a successor benchmark or quantify the financial magnitude of transitioning to an alternative, we believe there is enough guidance from authorities to initiate the transition.

Nevertheless, S&P Global Ratings believes that the low notional amount of LIBOR exposure relative to overall debt portfolios should limit the extent of financial pressures and credit implications for USPF issuers. Given the recent announcement and permitted extension of LIBOR publication, S&P Global Ratings believes the transition of LIBOR has become less of an immediate threat as USPF issuers now have longer to prepare.

Does this announcement mean LIBOR is definitely going away?

We think it is likely the IBA and FCA will stop publishing LIBOR and that issuers should be ready to transition as the recent announcement may affect trigger clauses in certain documents.

While the IBA has the ability to continue to post one-month, three-month, and six-month LIBOR for a period beyond June 30, 2023, the announcement by the FCA on March 5, while not unexpected, does potentially trigger LIBOR events found in many documents tied to issuer debt and derivative obligations and, consequently, issuers should be aware of the associated fallback language and how a replacement benchmark will be implemented with the cessation of LIBOR.

Despite the extension of LIBOR cessation through June 30, 2023, and potentially beyond for some tenors, U.S. authorities are still encouraging banks and borrowers to transition away from LIBOR by the end of 2021. As a result, the Federal Reserve, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency are no longer allowing new contracts to use LIBOR beyond December 2021 and, that being the case, we expect to experience an increase in alternative benchmark securities throughout the sector.

What ramifications will these trigger events have on issuers?

The trigger event indicates that a benchmark transition is underway, and issuers should identify the scope of impact and potential costs associated with transitioning to a new benchmark.

We believe that LIBOR trigger events that will affect the majority of USPF issuers will be predominately found in derivative agreements and are considered an index cessation event. The International Swaps and Derivatives Association (ISDA) published IBOR Fallbacks Protocol and Supplement, effective Jan. 25, 2021, where parties can adopt the protocol to amend outstanding agreements where upon the cessation of LIBOR, the replacement benchmark will be the Secured Overnight Financing Rate (SOFR) plus a credit adjustment spread.

In the U.S., the Alternative Reference Rate Committee (ARRC) was established to guide the transition away from LIBOR to SOFR. The ARRC has provided fallback language recommendations for floating rate notes as well as loan documents which provides issuers guidance to adopt new LIBOR based securities as well as amend existing obligations. On March 24, 2021, New York State's Senate and Assembly approved legislation that assists in the transition of legacy LIBOR contracts governed by New York State law that does not have fallback language. If signed into law, the

legislation will provide fallback language similar to the ARRC and the replacement rate will be SOFR-based. Since most contracts reference New York State law, we believe this legislation could mitigate potential transition risks relating to fallback language.

The change in benchmark carries the potential for an increased cost of capital as well as reissuance costs that could negatively affect an issuer's budgetary performance, flexibility, and liquidity; consequently, management should be aware of the implication and act accordingly.

What will the new benchmark be and how has the U.S. market responded?

SOFR, a transaction-based interest rate which is based on overnight loans collateralized by U.S. Treasuries, will be the new benchmark rate supported by the ARRC and the U.S. market has been slow to shift to SOFR.

SOFR is traded with an average daily volume of more than $1 trillion in overnight treasury repo transactions, whereas LIBOR pales by comparison with a transaction volume of about $500 million. While the Federal Reserve Bank of New York began publishing SOFR overnight rates in April 2018, markets have been slow to adopt SOFR as a replacement rate despite seeing SOFR-linked debt issuances, derivatives, futures, and options all being exercised. Compared to the U.K's equivalent replacement Secured Overnight Index Average (SONIA) that has traded derivative notional totaling $3.4 trillion YTD compared to SOFR's $475.1 billion, we believe this indicates the U.S. market's burgeoning acceptance of this transition from LIBOR to SOFR. For more on the comparison between LIBOR and SOFR benchmark rates, see "SOFR Emerging as Alternative to LIBOR in U.S. Debt Markets," published Dec. 4, 2020, on Ratings Direct.

USPF exposure tends to be limited because of moderate use of variable-rate debt in the past decade thanks to an exceptionally low-interest-rate environment, which in turn limited the use of related swaps and hedges with LIBOR benchmarks

7 Apr, 2021

NY LIBOR Transition Legislation: Can We Now Stop Talking About LIBOR Fallbacks and Amendments?

On March 24, 2021, New York State's Senate and Assembly approved LIBOR transition legislation. New York Governor Andrew Cuomo's consent awaits and is expected as the governor indicated his support earlier this year.

The law will have limited impact on syndicated loan markets; the long-running discussion of LIBOR fallbacks and LIBOR transition amendments will continue. This is a positive step, however, for other debt markets where inclusion of LIBOR fallback language is not common.

The law closely tracks the text of legislation proposed by the Alternative Reference Rates Committee (ARRC), the committee established by the Federal Reserve Board and the New York Federal Reserve Bank to manage the transition from LIBOR. The law includes the following key provisions:

- It covers only contracts governed by New York State law. There are efforts to pass similar legislation at a federal level and in other states.
- It covers only LIBOR contracts that either (i) contain no methodology or procedure for determining the interest rate once LIBOR is not available (a fallback provision) or (ii) have a fallback provision

using a different LIBOR-based rate as the fallback.
Most sophisticated syndicated and bilateral loan agreements contain a fallback provision, even those agreements entered into prior to regular market use of the model ARRC fallback language. The ARRC "hardwired" or "amendment" fallback language provides for SOFR or a negotiated rate, respectively, to be used in the case of LIBOR termination. Pre-ARRC fallback language typically falls back to a prime interest rate.
A significant number of other types of debt contracts, however, have no fallback language. This new law aims to provide a procedure for determining a fallback for this group of contracts. A recent Federal Reserve Bank "Progress Report" on the state of LIBOR transition estimates that $2 trillion of "tough legacy" LIBOR contracts exist without any fallback provisions. Many of these contracts exist in debt markets where amendments to debt contracts are difficult to obtain. These include certain types of securitizations, floating rate notes, mortgages, municipal bonds, and derivatives.

- It provides that the fallback for applicable contracts will be a SOFR-based interest rate similar to the approach of the ARRC hardwired fallback model language, and declares SOFR as a "commercially reasonable substitute for and a commercially substantial equivalent to LIBOR."
- It prohibits parties to applicable contracts from refusing to perform their obligations under the contracts as a result of application of the law, and provides a litigation safe harbor as a result of application of the law.
- It nullifies contractual fallback methodology relying on polls, surveys, and inquiries of dealers and lenders, more often found in certain derivatives and loan agreements. The law is not without potential controversy. Some commentators, including the New York City Bar Association (which supports the law), have noted that, in the case of contracts subject to the Federal Trust Indenture Act, application of the law may violate the Act. Other concerns with the law include possible federal and New York State constitutional claims to its legality.

Morrison & Foerster LLP – Geoffrey R. Peck

March 29 2021

FINRA Requests Comment on Proposed Amendments to the Margin Rule Regarding When Issued and Other Extended Settlement Transactions.

Comment Period Expires: May 14, 2021

Summary

FINRA seeks comment on proposed amendments to Rule 4210 (Margin Requirements) that would clarify and incorporate into the rule current interpretations regarding when issued and other extended settlement transactions, and provide relief to facilitate the application of the rule to these transactions.

The proposed rule text marked to show changes from the current rule text is available in Attachment A.

Two additional attachments are included to assist in the review of the proposed amendments. Attachment B consists of examples illustrating the operation of the rule under the proposed amendments. Attachment C is a flow chart outlining an analysis of the application of the proposed rule to these transactions. Attachments B and C are included for illustrative purposes only.

Continue reading.

GFOA New and Revised Best Practices and Advisories.

On March 5, GFOA's Executive Board passed several sweeping best practices and advisories regarding Environmental, Social and Governance (ESG) disclosures by municipal issuers as well as member alerts regarding LIBOR cessation and In-Kind Asset Transfers to Defined Benefit Pension Plans.

Please see below for details and links to the new and revised best practices and advisories:

GFOA Best Practice on ESG Disclosure

Governmental issuers are getting ahead of the curve by moving forward with voluntary best practices calling for governments to include information about climate risk and what it is doing to prepare for climate change and environmental events in their bond offering documents. This best practice is instructive on disclosure data already at hand and provides a template to move forward on environmental disclosures to all stakeholders. Specifically, this best practice ***recommends that governments evaluate the development and disclosure of information regarding the primary environmental risks applicable to municipal issuers and their bonds in their preliminary and final official statements used in connection with bond sales and in other voluntary disclosure. Governments should also disclose plans developed, strategies deployed, actions taken, and infrastructure built to address the environmental risks, which will vary depending on the geographical location of the issuer.***

VIEW BEST PRACTICE

GFOA Advisory on LIBOR Transition

Additionally, the GFOA Executive Board issued an advisory regarding the cessation of LIBOR. This is in addition to GFOA's suite of materials created with GFOA's Industry Workgroup on LIBOR including the Hunt for LIBOR and the ISDA Top Ten. For these resources and more, go to the LIBOR landing page. ***GFOA recommends that governments start planning for the phase out of LIBOR despite the ICE announcement that certain LIBOR tenors may continue to be published past the December 31, 2021, Cessation Date. Steps include identifying LIBOR exposure in contracts; consulting with municipal/swap advisors and bond counsel; determining whether, and obtaining, governing body approval to amend any contracts with LIBOR references; and determining whether changes in those contracts may trigger any disclosure and/or accounting reporting requirements. GFOA encourages governments not to enter into new contracts that reference LIBOR especially if the contract extends past the expected LIBOR Cessation Date.***

VIEW ADVISORY

GFOA Advisory on In-Kind Asset Transfer to Defined Benefit Pension Plans

Aggregating perspectives of GFOA members representing both general governments as well as administrators of defined benefit pension plans, this advisory ***does not recommend transferring ownership of government-owned infrastructure to a defined benefit plan for many reasons including:***

- The intangibility of the benefit to pensioners
- The significant liquidity risk of such a transaction and
- Valuation costs and irrevocability of such a transaction

VIEW ADVISORY

GFOA Best Practice on Issuing Taxable Debt

GFOA Executive Board renewed and enhanced the best practice on issuing taxable debt. ***GFOA recommends that state and local governments consider whether issuing taxable debt is the best financing option for their proposed project, and develop a thorough understanding of the differences between the tax-exempt and taxable markets before proceeding with a planned sale. Each issuer should conduct an analysis of how these differences will affect the overall financial plan and ability to manage its debt program, and consult appropriate counsel, and advisors.***

VIEW BEST PRACTICE

GFOA Best Practice on Managing Build America and Other Direct Subsidy Bonds

GFOA Executive Board renewed and enhanced the best practice on managing direct subsidy bonds. ***GFOA recommends that governments that issued BABs or other direct subsidy bonds, be acutely aware of their ongoing responsibilities associated with these bonds and be cognizant of Internal Revenue Service (IRS) actions related thereto. Additionally, if Congress reinstates direct subsidy bond programs, the GFOA advises governments to exercise caution and have a full understanding of the differences between tax-exempt bonds and direct subsidy taxable bonds.***

VIEW BEST PRACTICE

GFOA Best Practice on Sale of Bonds

GFOA Executive Board renewed and enhanced the best practice on selecting and managing the method of sale. ***When state and local laws do not prescribe the method of sale of debt, the Government Finance Officers Association (GFOA) recommends that issuers select a method of sale based on a thorough analysis of the relevant rating, security, structure and other factors pertaining to the proposed bond issue. If the issuer has in-house expertise (dedicated debt management staff whose responsibilities include daily management of a debt portfolio), this analysis and selection could be made by the issuer's staff. However, in the more common situation where an issuer does not have sufficient in-house expertise, this analysis and selection should be undertaken with the advice of a municipal advisor. Note: Municipal Securities Rulemaking Board (MSRB) Rule G-23 states that a firm may not serve as a municipal advisor and an underwriter on the same transaction.***

VIEW BEST PRACTICE

MBFA Submits Testimony to Ways and Means on Municipal Bond Hearing.

Today, the Municipal Bonds for America Council (MBFA) submitted testimony following the House Ways and Means Subcommittee on Select Revenue Measures March 11th hearing titled, "Tax Tools

to Help Local Governments."

The MBFA testimony can be viewed here.

While the hearing covered a multitude of other tax issues, the majority of the discussion focused on municipal bonds in the context of infrastructure financing, highlighting many municipal market and MBFA priorities.

The MBFA testimony focuses on the Councils main legislative priorities:

- Restoration of tax-exempt advance refundings
- Expansion of PABs including ESG
- Raising the BQ debt limit; and
- Reinstatement of direct-pay bonds exempt from sequestration.

This week, the MBFA Steering Committee is hosting the legislative staff of Senator Roger Wicker (R-MS), the sponsor of the LOCAL Infrastructure Act that would fully reinstate tax-exempt advance refundings, to discuss next steps in the Senate and possible reintroduction of the Senators American Infrastructure Bond legislation of the 116th Congress.

The MBFA will continue to provide details as they become available.

Bond Dealers of America

March 24, 2021

SEC 2021 Examination Priorities – Focus on Municipal Securities and Municipal Advisors - Ballard Spahr

The U.S. Securities and Exchange Commission's Division of Examination (Division) announced its 2021 examination priorities (the Report) on March 3, 2021. The Division's examination priorities reflect areas that present "heightened risks to investors or the integrity of U.S. Capital Markets."

This briefing discusses the following areas of the Division's 2021 focus:

- Respecting the importance of compliance departments
- Municipal advisors
- Environment, Social, and Governance (ESG) and how registrants are preparing for the expected discontinuation of the London Inter-Bank Offered Rate (LIBOR)

Looking back over 2020, the Division reported its satisfaction that firms delivered financial services "as they should have" in spite of the COVID-19 pandemic but noted their heightened and continuing concern about cybersecurity with the publication in 2020 of two cybersecurity risk alerts and a special report. The 2021 Report also discussed the completion of initial examinations of firms' implementation of Regulation Best Interest and the new Form CRS and provided guidance on successful implementation approaches.

Emphasis on the Critical Role Played by Compliance Departments

The Report included a strongly worded message about the critical importance of internal compliance

programs at regulated entities, especially since an increasing number of staff of registered firms are working remotely. Based on "thousands of examinations of many different types of firms," the Report noted certain "hallmarks" of effective compliance programs including:

- a compliance department's active engagement in most facets of firm operations;
- early involvement by compliance in important business development, such as product innovation and new services;
  knowledgeable and empowered Chief Compliance Officers with full responsibility, authority, and resources to develop and enforce policies and procedures of the firm; and
- a commitment from C-level and similar executives to set a tone from the top that compliance is integral to the success of the firm and a continuous commitment to ensure adequate resources and tangible support for compliance at all levels of the firm.

Municipal Securities and Other Fixed Income Securities

In connection with a statement about the importance of timely and accurate municipal issuer disclosure as a result of the significant effects of the pandemic on the finances and operations of many municipal issuers, the Division stated it will examine the activities of broker-dealers and underwriters to assess whether they are meeting their respective obligations in relation to municipal issuer disclosure. This portends an examination of underwriter due diligence practices and SEC Rule 15c2-12 compliance in connection with municipal issuer offering documents. For a discussion of the SEC's views on municipal disclosure practices in the light of the pandemic, see our Mid-Year 2020 Newsletter here. In addition, the Division will focus on an examination of broker-dealer trading activity in the areas of best execution, fairness of pricing, mark-ups and mark-downs, commissions, and confirmation disclosure requirements.

Municipal Advisor Examination Topics

Throughout 2021, the Division plans to examine the following areas:

- Whether municipal advisors "adjusted their practices" in the light of the impact of COVID-19 on the finances and operations of municipal issuers. In the Report, the Division draws a clear connection between "the importance of timely and accurate municipal disclosures" which is "critical to investors" and the duties of municipal advisors. This emphasis may portend a closer examination of the scope of services provided by municipal advisors to issuers in the context of disclosure. The Report also stated that the Division intends to examine whether municipal advisors documented the scope of their client engagements as required under MSRB Rule G-42.
- Whether municipal advisors relied on the Temporary Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors (June 16, 2020).
  Whether municipal advisors have met their fiduciary duty obligations to municipal entity clients in regard to their disclosure of and management of conflicts of interest.
  Whether municipal advisors satisfied registration, qualification, CLE and supervisory requirements.

LIBOR Preparedness, Municipal Advisors: The Division stated its intent to engage with municipal advisors to assess their understanding of their own exposure to LIBOR, their preparations for the expected discontinuation of LIBOR and the transition to an alternative reference rate in connection with their financial matters related to LIBOR, and most relevant, those of their clients.

This follows the MSRB's publication *LIBOR Transition Information* available here and the SEC's Office of Municipal Securities Staff *Statement on LIBOR Transition in the Municipal Securities Market* available here. In both statements, municipal advisors were advised that under MSRB Rule

G-42, if a municipal advisor makes a recommendation of a municipal securities transaction or product involving LIBOR (or is asked to review a recommendation of a third party), it must have a reasonable basis to believe the transaction or product is suitable for that client. In addition, with respect to a recommendation, the municipal advisor must inform the client of the risk, benefits, structure, and other characteristics as well as the suitability basis for any recommendation.

LIBOR Preparedness, Underwriters of Municipal Securities: The MSRB LIBOR publication described above reminded underwriters of their duty to make particularized disclosures for underwritings deemed complex municipal securities financings, in which LIBOR related financings are included. The Report portends the enhanced examination of municipal underwriters and their G-17 disclosure obligations respecting instruments using LIBOR.

Market Regulatory Infrastructure

Acting SEC Chair Allison Herren Lee stated that the Division will continue its oversight of the Financial Industry Regulatory Authority (FINRA) by "focusing on examinations on FINRA's operations and regulatory programs and the quality of FINRA's examinations of broker-dealers and municipal advisors." The Division will also examine the Municipal Securities Rulemaking Board (MSRB) to evaluate the effectiveness of its policies, procedures, and controls.

Our Municipal Securities Regulation and Enforcement Group and Public Finance Group continue to monitor any developments of the Division's exam priorities and findings as they relate to the municipal securities market.

By Kim Magrini, Rebecca Lawrence, Andy Miles

March 24, 2021

NFMA Releases White Paper on COVID Disclosure.

The NFMA has released a draft White Paper on Guidance & Insights Regarding Emergency Event Disclosure Affecting State & Local Governments: COVID-19 Focus for public comment through April 30, 2021.

To view the paper, click here.

National Federation of Municipal Analysts

SIFMA Statement on Passage of New York State LIBOR Legislation.

New York, NY, March 25, 2021 – SIFMA today issued the following statement from president and CEO Kenneth E. Bentsen, Jr. on the passage of LIBOR legislation by the New York State Legislature:

"We are pleased the New York State Legislature passed the model law for New York to help transition 'tough legacy' contracts that are difficult or practically impossible to amend. SIFMA, as a member of the Alternative Rates Reference Committee (ARRC), helped develop and championed this legislation to facilitate a smooth transition from LIBOR to an alternative reference rate, which is a top priority for the financial services industry. SIFMA supports market, legislative and regulatory efforts to ensure a smooth transition while avoiding market disruption and legal uncertainty, and to that end we encourage Congress to pass a federal law similar to the one passed in New York to address these issues on a national level."

GASB Publishes Annual Crain Grant Program Request for Research Proposals.

Request for Research Proposals.

03/22/21

MSRB Seeks Comment on Regulation of Solicitor Municipal Advisors.

The MSRB requested comment on proposed MSRB Rule G-46 ("Duties of Solicitor Municipal Advisors"), which would codify previously issued interpretive guidance concerning the requirements applicable to solicitor municipal advisors under MSRB Rule G-17 ("Conduct of Municipal Securities and Municipal Advisory Activities").

Proposed MSRB Rule G-46 would, among other things:

- require solicitor municipal advisors to record their relationships in writing;
- require that representations made by solicitor municipal advisors to solicited entities be accurate and not misleading;
- require additional compensation and conflict of interest disclosures; and
- establish standards concerning the timing and manner of the required disclosures.

The proposed rule would also conform certain requirements applicable to such firms to those that apply to (i) non-solicitor municipal advisors under MSRB Rule G-42 ("Duties of Non-Solicitor Municipal Advisors") and (ii) underwriters under MSRB Rule G-17, as they relate to the conduct of municipal securities and the activities of municipal advisors.

Comments on the proposed rule must be submitted by June 17, 2021.

Cadwalader Wickersham & Taft LLP

March 18 2021

FINRA Seeks Comment on Margining of Extended Settlement Transactions.

FINRA requested comment on proposed amendments intended to clarify the application of the FINRA Rule 4210 ("Margin Requirements") to "when issued" and other extended settlement transactions.

Among other things, the proposed amendments would:

- provide a definition for "extended settlement transaction" (generally T+2);
- subject to significant exceptions, require all extended settlement transactions and net positions resulting from extended settlement transactions to be margined as if they were in a margin account;
- exempt from the margining requirements (i) covered agency transactions, (ii) certain when-issued security transactions, (iii) certain refunding transactions and (iv) settlements extended as a result of the mechanics of a transaction with a bona fide delivery vs. payment ("DVP") customer;
- clarify that the scope of the public offering exception for when-issued transactions is limited to equity IPOs;
- provide new exceptions for when-issued transactions in U.S. Treasury (14 calendar days) and municipal securities (42 calendar days); and
- codify interpretations as to concentration and other limits on a firm taking capital charges taken in lieu of collecting margin.

Comments on the proposed amendments must be submitted by May 14, 2021.

Commentary

There is currently a fairly wide divergence as to the understanding of the regulations applicable to extended settlement transactions, not only as between member firms and FINRA, but even as between the member firms. This long-awaited FINRA proposal (which, if adopted, would be the most extensive amendments to Rule 4210 in over a decade) is a positive step forward in that it provides a means for a public discussion as to the appropriate requirements.

Although the issue has been a notable topic for years among market participants and FINRA, all broker-dealers should closely review their practices in this area. Among other things, firms should consider their settlement processes as to new issues, both public and private, so as to determine whether these practices would conform to the FINRA proposal, and whether they should put in a comment.

Cadwalader Wickersham & Taft LLP – Nihal S. Patel

March 15 2021

Are you Ready for the End of LIBOR? The Fed Issues Guidance on Assessing LIBOR Transition Progress - McGuireWoods

On March 9, 2021, the Federal Reserve in its Supervision and Regulation Letter (the **Letter**) provided guidance to Federal Reserve examiners and supervised institutions to assist in assessing progress in preparing for the LIBOR transition.

Specifically, examiners are directed to review the supervised institutions' "planning for, and progress in, moving away from LIBOR." Supervised institutions should note that examiners are encouraged to consider taking supervisory action if an institution is not ready to cease issuances of new LIBOR-based contracts by the end of 2021.

In the Letter, the Fed recognizes that the transition plans will differ depending on the institution's LIBOR exposure and have provided separate guidance for those with less than $100 billion in total consolidated assets (**Small Firms**) and institutions with more than $100 billion in total consolidated assets (**Large Firms**). The guidance for both Small Firms and Large Firms sets out considerations for examiners in six key areas:

- **Transition planning:** Institutions should have plans in place to transition from LIBOR and the detail and scope of those plans should be commensurate with its LIBOR exposures. Large Firms should ensure that their LIBOR transition plans are more detailed and include a governance structure that clearly defines roles and responsibilities needed to execute the plan.
- **Financial exposure measurement and risk assessment:** Institutions should accurately measure their LIBOR exposures and report those exposures to senior management. Large Firms should ensure that reporting is done frequently, and that the institution can identify the proportion of its LIBOR exposure that runs off before the relevant LIBOR tenor ceases (for more information, please see our earlier blog post). Large foreign firms should measure LIBOR exposures booked and/or managed within the U.S., and be able to quantify exposures within their U.S. operations in comparison to the exposures of the foreign parent entity.
- **Operational preparedness and controls:** Institutions should identify internal and vendor-provided systems and models that use or require LIBOR and, wherever possible, make adjustments to ensure smooth operation of those systems and models upon the cessation of LIBOR. A contingency plan should be established in the event that a service provider is unable to deliver a solution in a timely manner.
- **Legal contract preparedness:** All LIBOR-referencing contracts should be identified, and new LIBOR-referencing contracts should have robust fallback language that includes a clearly defined alternative reference rate. Institutions should determine the impact of LIBOR's cessation on their contracts and take steps to modify those contracts prior to LIBOR's cessation. For institutions that are large users of derivatives, adherence to ISDA's IBOR Fallback Supplement and Protocol should be considered.
- **Communication:** Institutions should communicate with all counterparties, clients, consumers and internal stakeholders about the LIBOR transition, and ensure compliance with all applicable laws and regulations, and with the prohibition on engaging in unfair or deceptive practices. Large Firms should implement training for employees on the LIBOR transition, including how staff should communicate the implications of the transition externally.
- **Oversight:** Institutions should provide their LIBOR transition plans to management, and provide regular status updates to senior management. Foreign institutions with U.S. total assets exceeding $100 billion should provide status updates to the U.S. Chief Risk Officer and U.S. Risk Committee.

Based on this, supervised institutions should expect more scrutiny on their LIBOR transition plans in the upcoming weeks and months. Supervised institutions should ensure that they allocate sufficient resources and attention to their plans and be careful to ensure compliance with this guidance.

Please contact any of the authors of this briefing or your regular McGuireWoods contact if you have questions about, or would like assistance with, the LIBOR transition.

By Donald A. Ensing, Susan Rodriguez, Jennifer J. Kafcas, Alvino S. van Schalkwyk & Harry Poland on March 17, 2021

McGuireWoods LLP

Ridding Trust Indentures of Pesky Bearer Bond Language: Butler Snow

The euphemistically-named Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), that became law on September 3, 1982, required that tax-exempt obligations be in registered form (as well as denying certain tax benefits to non-tax-exempt obligations that are not in registered form). Prior to the enactment of TEFRA, virtually all municipal bonds were bonds payable to bearer, with payment coupons attached, and the bonds were printed by a handful of specialty printers, most notably Northern Banknote in Chicago. From the enactment of TEFRA until 1999, when The Depository Trust Company ("DTC") and National Securities Clearing Corporation combined and DTC began clearing municipal securities, tax-exempt bonds were typically printed by the same bond printers with a blank following "Registered Owner" into which would be typed the name of the owner of the bond. Beginning in 1999, tax-exempt bonds began being issued in book-entry form with the registered owner being Cede & Co., the nominee of DTC. Initially, bonds, which were now typically typewritten, had to be delivered physically to DTC prior to closing the bond issue. Within a few years, it became customary for bonds to delivered to the indenture trustee to be held in custody under the DTC Fast Automated Securities Transfer ("FAST") program.

Despite approaching 40 years since bearer bonds were eliminated and over 20 years since printed bonds were customary, 2021 trust indentures still often contain bearer-bond and printed bond concepts. A confession by the author – he is still attempting to weed out these concepts and definitions.

Temporary Bonds.

One still sees the following provision on occasion. Temporary bonds were infrequently issued in the days of printed bonds, but have unlikely been used since the early 2000s.

Pending preparation of definitive Bonds, or by agreement with the purchasers of all the Bonds, the Issuer may issue, and, upon its written direction, the Paying Agent shall authenticate, in lieu of definitive Bonds one or more temporary printed or typewritten Bonds in Authorized Denominations of substantially the tenor recited above.

Presentation of Bonds.

Book-entry bonds are not presented for payment – all payments of principal, premium, and interest are wired to DTC. Occasionally in private activity bond financings, subordinated bonds are issued as physical bonds rather than book-entry bonds and these provisions would be appropriate. In most instances, the requirements for presentment should be eliminated.

The principal of, and premium, if any, on the Bonds shall be payable upon presentation and surrender thereof at the principal office of the Trustee, or of its successor in trust.

Each notice of redemption shall specify the date fixed for redemption, the principal amount of Bonds or portions thereof ($5,000 or any integral multiple of $5,000 in excess thereof) to be redeemed, the redemption price, the place or places of payment, that payment will be made upon presentation and

surrender of the Bonds to be redeemed, that interest accrued to the date fixed for redemption will be paid as specified in said notice, and that on and after said date interest thereon will cease to accrue.

Use of the term Bondholder.

Bondholder is a bearer bond concept – once bonds were held by the owners of the bonds, but for nearly four decades that has not been the case. It is still common to see various provisions in indentures require consent or direction of Majority Bondholders, often defined as follows,

"Majority Bondholders" means, at the time of determination, the Owners of a majority in principal amount of Bonds then Outstanding.

"Bondholders" or "Bondowners" or "Owners" means the Persons in whose names any of the Bonds are registered on the books kept and maintained by the Paying Agent as bond registrar.

DTC is the Owner under these definitions and DTC is simply a nominee for its participants which hold bonds on behalf of the beneficial owners, the "true" owners of the bonds. Better defined terms are "Registered Owner" for DTC as the person in whose name the bonds are registered on the books kept by the bond registrar and "Beneficial Owner" for the true owners of the bonds who would give consent or direction.

Butler Snow LLP

March 16, 2021

Financial Accounting Foundation Appoints Robert W. Hamilton to the Governmental Accounting Standards Advisory Council.

Norwalk, CT—March 17, 2021 — The Board of Trustees of the Financial Accounting Foundation (FAF) has announced the appointment of Robert W. Hamilton to the Governmental Accounting Standards Advisory Council (GASAC). He is the statewide accounting and reporting manager for the state of Oregon.

Mr. Hamilton was nominated by the National Association of Auditors, Comptrollers and Treasurers (NASACT) and will assume the role vacated by the appointment of Alan Skelton to the position of director of research and technical activities of the Governmental Accounting Standards Board (GAS B). He will serve a two-year term that began on February 23, 2021 and concludes December 31, 2022. He is eligible for reappointment for two additional two-year terms.

The GASAC is responsible for advising the GASB on technical issues, project priorities, and other matters that affect standards setting for accounting and financial reporting by state and local governments. Members of the GASAC represent a cross-section of the GASB's state and local government stakeholders, including users, preparers, and auditors of financial information. GASAC members are selected on the basis of their professional expertise and the depth and breadth of experience they bring to the GASAC.

"We are pleased to welcome Robert as a member of the GASAC," noted FAF Board of Trustees Chair Kathleen Casey. "His experience with the implementation of GAAP, in addition to his committed participation in the GASB task force advising the updating of the existing concepts on note

disclosures, makes him a valuable addition to the Advisory Council," Ms. Casey added.

Mr. Hamilton has served the state of Oregon since 2012, advancing from senior accounting analyst to his current role. He is responsible for issuing the state's audited annual financial report, maintaining the state's accounting manual, overseeing the statewide accounts receivable management team, providing statewide direction on appropriate accounting practices, and leading statewide implementation of GAAP changes, among other duties.

He holds a bachelor of arts in accounting from the University of Oregon and is a certified public accountant. Mr. Hamilton is actively involved with the National Association of State Comptrollers (NASC), including as a member of its Executive Committee and NASACT.
